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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 657

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

RILLA MAE FREEMAN, ADMINISTRATRIX OF THE ESTATE OF MURPHY HILL FREEMAN, DECEASED,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Jurisdiction	1
Statement of the matter involved	2
Questions presented	7
Reasons for allowance of the writ	8
Prayer for writ	9
Brief in support of petition	10
Opinion below	10
Jurisdiction	10
Statement of the case	10
Questions presented	10
The statute involved	11
Argument	11
Summary of argument	11
Conclusion	19
Appendix:	
Exhibit A—Code of Alabama of 1940, Section 170, Title 48	20
Exhibit B—Opinion of Supreme Court of Alabama in case of *Atlantic Coast Line* v. *Bargainer*	21

Table of Cases Cited

Atlantic Coast Line v. *Barganier* (decided by Supreme Court of Alabama January 3, 1952 and printed herein as exhibit B)	18
Atlantic Coast Line v. *Robins*, 192 F. 2d 657	19
Carter v. *Pennsylvania R. Co.*, 172 F. 2d 521	13
Fayet v. *St. Louis & S. F. R. Co.*, 203 Ala. 3, 81 So. 671	13
Hines v. *Cooper*, 205 Ala. 70, 88 So. 133	19
Louisiana & Arkansas Ry. v. *Jackson*, 95 F. 2d 369	13

Page

Loisville and Nashville R. Co. v. *Griffin*, 240 Ala. 213, 198 So. 345 16
Pollard v. *Davis*, 93 F. 2d 193 13
Roberts v. *Louisville & Nashville R. Co.*, 237 Ala. 267, 186 So. 457 19
Rothrock v. *Alabama Great Southern R. Co.*, 201 Ala. 308, 78 So. 84 18

STATUTES CITED

Alabama Code of 1940, Section 170 of Title 48 ..... 4, 11
28 USCA Sec. 1254(1) 1, 10

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Atlantic Coast Line Railroad Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on the 14th day of December, 1951, which affirmed a judgment of the United States District Court, for the Northern District of Alabama in favor of the Respondent and against your Petitioner.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 USCA, Sec. 1254 (1).

The opinion of the Court of Appeals for the Fifth Circuit was filed December 14, 1951. Petition for rehearing was denied January 18, 1952 (R. 244).

Statement of the Matter Involved

The decedent, Murphy Hill Freeman, died as the result of a collision between an automobile, in which he was riding as a passenger, and a passenger train of Petitioner at a public road crossing. The Respondent, as his Administratrix, brought suit alleging his death to have been wrongfully caused by negligence of Petitioner's employees operating its train. At the conclusion of all the evidence in the United States District Court, the Petitioner (Defendant) duly moved the District Court to direct a verdict of the jury in its favor (R. 167) which motion taken under advisement, the cause was submitted to the jury, which returned a verdict for Respondent (Plaintiff). Petitioner's motion for directed verdict and for new trial was overruled (R. 193). The Court of Appeals for the Fifth Circuit, affirmed (R. 203).

The physical facts and surroundings of the crossing are material. These surroundings were in part shown by photographs, the originals of which were certified to the Court of Appeals separately from the printed record. While these photographs may be available to this Court, as requested by Petitioner, to avoid any confusion, we adopt the statements of the Court of Appeals regarding such physical aspects and surroundings as set out in the second and third paragraphs of its opinion as follows (R. 203-204):

> "The collision occurred about 8:22 a. m. on January 14, 1950, a foggy, misty morning, with light drizzling rain, where appellant's single main line track intersects a state highway at right angles near Powderly, Alabama, just outside the southerly city limits of

Birmingham. The train was about 10 minutes behind schedule. The crossing is in semi-rural territory, but near several populous areas. The highway, which connects the towns of Midfield and Fairfield, is paved 21 feet wide and carries reasonably heavy traffic. At the crossing, there is a conventional crossarm crossing sign, plainly visible to a car approaching from the north, but no other protective devices.

"The automobile in which deceased was riding approached the crossing from the north, traveling south at a speed of 25 to 35 miles per hour. The train approached from the east, or left side of the automobile, at a speed of about 45 miles per hour. As it approached the crossing, the automobile did not reduce its speed. Although the engineer testified he applied the emergency brakes as soon as he discovered the oncoming automobile, the train's speed was reduced very little before the collision. The automobile had almost cleared the crossing when it was struck on its left rear by the left pilot step on the front of the locomotive. After striking the automobile, the engine became uncoupled from the cars, apparently as a result of the impact, and traveled about 600 feet beyond the crossing before stopping.

"The approaches to the crossing of both highway and railroad were straight. To one looking straight ahead down the highway, or straight down the railroad track, there is a clear view of the crossing itself from a substantial distance away. From the east, however, the railroad track approaches the crossing through a shallow 'cut', on the sides of which are low banks. On top of these banks, and in the area to the north and east of the crossing, there were trees and rather dense weeds and other growth, so that an automobile driver approaching the crossing from the north would not have a clear view of a train approaching from the east, nor would the engineer of the train have a clear view of the approaching automobile, until train and automobile were quite close to the crossing. Even in winter, with foliage greatly reduced, the trunks of the trees

and the stems of thickly grown weeds and bushes obscure the view to the northeast of the crossing, across which area the engineer and driver of the car would have to look in order to see each other a substantial distance back from the crossing."

Section 170 of Title 48, Alabama Code of 1940, required that the engineer blow the whistle *or* ring the bell for at least one-fourth of a mile before reaching this public crossing. The engineer testified that when he reached the whistle post (shown by actual measurement to have been 1334 feet five inches from the crossing (R. 156)) he commenced blowing the regular crossing signal with the whistle, which consisted of two long blasts of the whistle, one short blast and a final and fourth long blast of the whistle to be continued until the crossing was reached (R. 136), and that he also set the bell on automatic ringer at the same place and that it continued to ring until after the train passed the crossing. The giving of these customary and required signals was corroborated by the flagman (R. 127), the brakeman (R. 97), the conductor (R. 116). In addition a passerby, one Penney, a witness for the appellee, testified he was walking along beside the track in the direction from which the train was coming, was familiar with the regular type of crossing blasts of the whistle, and that positively the whistle was blown for a quarter of a mile before reaching the crossing (R. 47-51). Also one Neale, a witness for the Petitioner (Defendant), testified that he was familiar with the road and crossing of the tracks in question, that at the time he was approaching this crossing about two blocks away, was thoroughly familiar with the type of crossing signal blown for public crossings, and that he heard the several long and short loud blasts of the whistle of Petitioner's train as it approached that crossing, immediately before the accident happened (R. 90-92).

There were only two other witnesses who mentioned the whistle in any way whatever.

One Foster, a witness for the Respondent (Plaintiff) testified that he was driving his automobile along the road immediately behind and going in the same direction as the automobile in which the decedent Freeman was riding, at a speed of about twenty-five to thirty miles per hour (R. 28); that when he was about one hundred to one hundred fifty feet from the crossing he became conscious of the approach of the train by hearing its whistle blowing loudly (R. 34). That at the time he first heard and then saw the train, the engine was approximately two hundred feet from the crossing (R. 30-31) and that the whistle continued to blow long and loud until the engine reached the crossing; that the car ahead of him in which Freeman was riding continued on to the crossing without stopping and the rear of the automobile was struck by the engine (R. 30-36). That he pulled off the road to the right and stopped before reaching the crossing (R. 36).

One Scales, a witness for the Respondent (Plaintiff), testified that he was approaching the crossing in question from the opposite direction from the approach of the automobile occupied by the decedent Freeman; that after he had topped a hill and had reached a point about two hundred feet from the crossing where he had a view of the crossing the collision between the automobile and the engine took place (R. 39); that he therefore did not see the automobile in which Freeman was riding before the collision (R. 60); that he did hear the train whistle at or maybe a little before the time the actual collision took place (R. 62); that before he reached the point where he could and did see the crossing and the accident in question, there had been a high hill in between him and the railroad track of the Petitioner, that he had also passed another railroad crossing on the highway and had driven along by a factory which was making a

hissing sound and was not paying any attention to any train on the Atlantic Coast Line Railroad track, and did not know whether the engine had blown any whistle prior to the time he came in sight of the track or not (R. 63). Concerning the extent of obscurity of vision between the engineer and the motorist approaching as was Freeman, Highway Patrolman Turner testified to actual measurements and demonstrations made the morning of the accident. With a locomotive stopped at a point two hundred feet from the crossing approaching in the direction from which the train in question approached, the trees and other vegetation along the railroad right of way and along the highway obstructed the view of the motorist approaching as was Freeman's automobile until it reached a point sixty-three feet from the railroad crossing (R. 111) at which point the said stopped locomotive could then be seen; approaching along the highway within sixty-three feet of the crossing, however, the view down the track became increasingly longer until at a point approximately twenty feet from the railroad track the view down the track in the direction from which the train was approaching was unlimited or unimpeded for approximately one mile (R. 113).

The engineer O'Neal further testified in regard to approaching the crossing with the bell ringing, and as he was engaged in blowing the fourth and final blast of the regular crossing whistle (R. 138, 139) and when he had reached a point about seventy-five to one hundred feet from the crossing he first discovered and saw the approaching automobile (R. 138); and that as quickly as it was humanly possible for him to do so he began sounding short alarm blasts with his left hand and with his right hand applied the brakes in emergency (R. 139); that there was nothing else that he could have done to have stopped or slowed the speed of the train (R. 143); the speed of the train was between forty-five and fifty miles per hour (R. 38).

The expert testimony on the application and functioning of air brakes such as were in use on the train in question, showed that on the average it requires two seconds of human reaction time on the part of the engineer in observing a condition requiring the application of brakes and actually putting them on (R. 161). Further that there is a mechanical reaction time of two seconds between the time the operator actually sets the brake in emergency and the time the brakes actually take effect throughout the train in emergency (R. 163) a total human and mechanical reaction time of four seconds between the time a situation requiring the application of brakes is observed by the operator and the time the brakes go into effect on the average.

The engineer further testified that in approaching the crossing on the occasion in question, the track was perfectly straight for over a quarter of a mile, that in approaching the last quarter of a mile, under the conditions of weather and otherwise then prevailing he had a clear view of the crossing itself, and was looking ahead at the crossing in approaching this last one-fourth of a mile and after passing the whistle post (R. 137); that he saw nothing on or approaching the track until he was about seventy-five to one hundred feet from the crossing, at which time the automobile occupied by Freeman came into his view at a point about fifty to seventy-five feet from the crossing (R. 138).

Questions Presented

1. In a suit involving a charge of negligence on the part of the engineer in control of a train in failing to give required warnings of approach to a public crossing and where six witnesses including the engineer and other three members of the train crew, and two other citizens in the immediate vicinity, testified positively and unequivocally

that such signals were given loudly and properly as the engine approached for one fourth of a mile of the crossing, whether the testimony of two persons driving automobiles nearby, and who were not listening, that they did not hear the train whistle until the engine was near crossing is sufficient to make a justiciable issue and conflict in the evidence as to the giving of the signals as the train approached the crossing.

2. In trial of a claim that the engineer of the defendant's railroad train in approaching a public crossing was guilty of negligence in failing to use all means at hand to avoid injuring the plaintiff after discovery of the plaintff in a position of peril whether actual knowledge of the plaintiff's peril on the part of the engineer, in time to have avoided the accident by the use of all means at hand, must be affirmatively shown by the evidence as a condition precedent to liability.

3. Whether there was sufficient evidence of either initial negligence or negligence after discovery of the decedent's peril (subsequent negligence) to warrant submission of the issues to the jury.

Reasons for Allowance of the Writ

1. With the record showing the positive and unequivocal testimony of six witnesses, the four members of the train crew and two citizens in immediate proximity, that the required signals of approach were given as the locomotive approached within one-fourth of a mile of the public crossing, the decision of the Court of Appeals that purely negative testimony of two persons driving vehicles near the crossing that they were not conscious of hearing the engine whistle until it was very near the crossing is sufficient to create a conflict in the evidence on a charge of negligent failure to give such signals is contrary to the decisions of the Supreme Court of Alabama, the decisions

of the United States Court of Appeals, Sixth Circuit and its own previous decisions on this important question of local law.

2. The decision of the Court of Appeals that actual knowledge of peril on the part of the defendant's employee, a basic element of liability for negligence after discovery of peril (known to Alabama law as "subsequent negligence"), may be inferred by a jury from the "circumstances" as distinguished from a requirement of probative facts disclosing such actual knowledge, is contrary to the opinions of the Supreme Court of Alabama.

A supporting brief accompanies this petition.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari issue to review the order of final judgment of the United States Court of Appeals for the Fifth Circuit entered by that Court in this case on December 14, 1951 (application for rehearing overruled January 18, 1952) and that said order of final judgment may be reversed by this Honorable Court, and the case be remanded to the United States District Court for the Northern District of Alabama with directions to enter a judgment in favor of your Petitioner, or if your Petitioner be mistaken in this, then for a new trial, and that your Petitioner may have such other and further relief as this Honorable Court may deem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the United States Court of Appeals, Fifth Circuit (R. 203) is reported in *Atlantic Coast Line Railroad Company* v. *Freeman*, C. C. A. 5th, 193 F. 2d 217.

II

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 1254(1) of Title 28, United States Code. The judgment of the United States Court of Appeals, Fifth Circuit, to be reviewed was entered December 14, 1951 (R. 207). Application for rehearing was denied January 18, 1952 (R. 244).

III

Statement of the Case

A statement of the case appears in the petition for writ of certiorari under the heading "Statement of the Matter Involved". In the interest of brevity, that statement is not now repeated, but is referred to with request that it be considered as incorporated here by reference.

IV

Questions Presented

The questions specifically raised by the petition for writ of certiorari appear there under the heading "Questions Presented". Again in the interest of brevity, they are not now repeated but are referred to with request that they be considered as incorporated here by reference.

V

The Statute Involved

This suit was instituted to recover damages for the death of Respondent's decedent, Murphy Hill Freeman, which resulted from injuries sustained in a collision between an automobile in which he was riding and a passenger train of Petitioner at a public crossing in Jefferson County, Alabama.

The only statute of Alabama which bears on the issues here raised is Section 170, Title 48, Code of Alabama of 1940, a copy of which is set out in the Appendix hereto, and in the Record (R. 243).

VI

ARGUMENT

Summary of Argument

1. Where six witnesses testify positively and unequivocally that required signals of approach to a public crossing were given by the locomotive engineer, the testimony of two witnesses merely that they did not hear the whistle until just before the accident is insufficient to make a conflict and issue for the jury where such witnesses were either not listening or not in a position to hear.

2. Actual knowledge by the engineer of the plaintiff's position of peril at a railroad crossing in sufficient time to permit the engineer to avoid the accident by use of all means at hand is a condition precedent to liability as for "subsequent negligence" and must be affirmatively shown by the evidence.

3. The evidence was insufficient to show any negligence or subsequent negligence on the part of Petitioner (Defendant) as the proximate cause of the death of the decedent

Freeman; on the contrary, the evidence showed without material conflict that the action of the driver of the automobile in which he was riding was the sole proximate cause of his injury and death.

1. *The evidence was insufficient to make an issue for the jury on a question of alleged negligent failure of the engineer to sound the proper warning signals for the crossing.*

Even in the State courts of Alabama, which follow the scintilla rule, there was no dispute under the evidence here that the required warning signals were given for this crossing and no issue was made for the jury on that element.

Here the record shows positive and unequivocal testimony of the engineer (R. 136), flagman (R. 127), brakeman (R. 97), conductor (R. 116), a person walking beside the track near the crossing on the side of the train approach and facing it (R. 47-51) and a traveler on the highway close by the crossing (R. 90-92) that the required signals, with which all were familiar, were sounded long and loud as the engine approached within one-fourth of a mile of the crossing. As opposed to this overwhelming positive proof there is only the testimony of two witnesses merely that they did not hear or were not conscious of the whistle's blowing until the train was near to the crossing. On this rainy, raw January morning both were at the time steadily driving automobiles toward the crossing with engines running, neither of them testified that they were listening or paying any attention to the crossing or possible approach of a train, one was approaching from behind a high hill, passing a factory making a noise, and neither of them undertook to say that the whistle had not been sounded before they heard and became conscious of its blowing.

Under these circumstances, the fact that the required signals were given was established without dispute.

As illustrative of the settled principle of law in Alabama in this regard, attention is invited to the opinion of the Supreme Court of Alabama in *Fayet* v. *St. Louis & S. F. R. Co.*, 203 Ala. 3; 81 So. 671, wherein the Court aptly stated its application as follows:

> "Consideration of the evidence will show no conflict as to whether the bell of the engine was ringing while the train approached and reached the crossing. The plaintiff, his son, and his wife, as witnesses, testified only that they heard no bell. This was a probable fact in view of the plaintiff's own admission that he did not stop his automobile or cut off his engine before going near or on the track. The engineer and fireman in charge testified that the necessary and required signal was given at said time and place."

The United States Court of Appeals, Fifth Circuit, has itself so held heretofore. *Louisiana & Arkansas Ry.* v. *Jackson*, 95 F. 2d 369; *Pollard* v. *Davis*, 93 F. 2d 193.

The United States Circuit Court of Appeals, Sixth Circuit, has likewise followed and applied this obviously sound principle. In *Carter* v. *Pennsylvania R. Co.*, U. S. C. A. 6th, 172 Fed. 2d, 521, that Court aptly held:

> "There was substantial uncontradicted testimony that the statutory signals were given. Although an attempt was made to show the contrary, Appellant's evidence on this issue was merely to the effect that certain witnesses did not hear the whistle or the bell. *But such witnesses were not listening for the signals or were not in a position to hear, and would not say that the signals were not given. Such testimony was not sufficient to take the case to the jury".* (Emphasis supplied.)

It appears unnecessary to extend this discussion or citation further. It is submitted that these authorities abundantly demonstrate that the opinion and judgment of the

Court of Appeals that on this record there was any justiciable issue of negligence as for failure of the engineer to give the required crossing warning signals is contrary to the opinions of the Supreme Court of Alabama, the United States Court of Appeals, Sixth Circuit, and even contrary to the prior opinions of the United States Court of Appeals, Fifth Circuit.

The principle of local law involved is obviously of major importance in almost every railroad crossing accident.

2. *Actual knowledge by the engineer of the plaintiff's position of peril at a railroad crossing in time to permit the engineer to avoid the accident, by the use of all means at hand, is a condition precedent to liability as for "subsequent negligence", and must be affirmatively shown by the evidence.*

This vital element may not be made to depend upon conjecture or speculation.

Here the evidence was without dispute that because of trees and other growth in the area between the railroad right of way and the highway the view by the engineer of an automobile, approaching as was Freeman's, and the view by the motorist of the engine was each obstructed until both "train and automobile were quite close to the crossing".

The engineer, the only member of the crew who saw the decedent's automobile before the accident, testified that he was looking ahead at the crossing and giving the proper signals with bell and whistle during the last quarter mile of approach (R. 137) and that as the engine reached a position about 75 to 100 feet in his judgment from the crossing he first saw decedent's automobile approaching and, in his judgment about 50 to 75 feet from the track (R. 137-138); that when he first saw the automobile he was in the act of

giving the last regular whistle blow for the crossing (R. 139) and immediately and as quickly as he possibly could, he commenced blowing short sharp blasts of the whistle with his left hand and applied the brakes in emergency with his right hand (R. 139); and that there was nothing else he could have done to stop or slow the train (R. 143).

A State Highway Patrol Officer (R. 107) directed to the scene immediately after the accident occurred, testified to actual measurements and tests he made at the scene immediately after the accident. While he was doing so another train approached from the same direction as the train involved in the accident and stopped a measured distance of 200 feet before reaching the crossing (R. 111). In reference to the view and obstructions, he testified that traveling on the highway toward the crossing the train stopped ("up here behind the bushes") 200 feet from the crossing could be seen upon reaching a point 63 feet from the crossing (R. 111); that the closer the track was approached the more extended was the view down it until at a point 20 feet from the track the view was almost unlimited in the direction from which the train approached.

The witness Foster, who was driving his automobile immediately behind and following Freeman's automobile, testified that when he first saw the train it was, he judged, about 200 feet from the crossing with whistle blowing and Freeman's automobile was, he judged, about 50 feet from the crossing (R. 34; 36) and that the whistle continued to blow until the collision occurred.

In this posture of the evidence there was no dispute that the engineer used all means at hand to check the speed of the train and to stop it, simultaneously giving every warning he could, as soon as he became aware of the decedent's peril.

As illustrative of the well established principles of law applicable in Alabama, attention is invited to the decision of the Supreme Court of Alabama in Louisville and Nashville Railroad Company v. Griffin, 240 Ala. 213; 198 So. 345, wherein the elements of liability are very clearly stated as follows:

> "It is well established in this jurisdiction that in order to predicate liability for subsequent negligence, the defendant must be shown to have had actual knowledge of the plaintiff in a perilous position, and thereafter negligently fail to use all the means at his command and known to skillful engineers, so circumstanced, to avert damage to the plaintiff, when to have promptly and duly used such means could have averted the accident. * * *
>
> "The engineer must have actual knowledge of the obstruction however. *Such knowledge cannot be imputed to him because of circumstances from which the jury might infer that he had actual knowledge.*" Emphasis supplied.)

There was here not even a scintilla of evidence to dispute the unequivocal testimony of the engineer that as soon as he saw the decedent's automobile approaching the track at a driving speed he did everything he possibly could to slow or stop the train and further warn the driver. The testimony of Foster, the only other witness who saw the collision, corroborates the engineer.

True, the engineer estimates that his engine was about 75 or 100 feet from the crossing when he first saw the decedent's approaching automobile. It might be contended that there could be a reasonable inference from the testimony that the engine was farther from the crossing than 75 to 100 feet when the engineer saw the automobile. The maximum distance from the crossing any such inference would support is 200 feet under all the evidence and

physical facts. The train was travelling 45 miles per hour —approximately 66 feet per second. Under the undisputed evidence, the train would have reached the point of impact before the average engineer could have gotten the brakes in effect. The testimony showed without dispute that in the application and effect of the regular type of train air brakes on that train there is a lapse of 2 seconds human reaction time and 2 seconds mechanical reaction time, a total of four seconds on the average, between the time the engineer commences to apply the brakes and the time they take effect in emergency.

Clearly and without dispute, had the engineer been the maximum possible distance from the crossing when he became aware of the automobile's approach without indication of stopping for the crossing, he could not have avoided the accident by the use of all available means.

Unusually apt upon the issues decided by the Court of Appeals in this case is the opinion of the Supreme Court of Alabama, rendered on January 3, 1952, in the case of Atlantic Coast Line Railroad Company, Appellant vs. Calvin F. Barganier, Appellee, not yet officially reported and now pending on Appellee's application for rehearing. The suit involved another accident which occurred at the identical crossing involved in this suit. Because of great similarity between the evidence and issues in the two cases, a copy of the opinion of the Supreme Court of Alabama in that case is set out in the Appendix hereto.

Aside from the fact that in that suit the driver of an automobile was the plaintiff, the evidence was in many material aspects either identical or very closely similar to the evidence here. We shall not extend this brief by quotation of or detailed comment on the facts recited therein, but respectfully invite the Court's attention to them. There the entire Alabama Court held there to be issues for the

jury either on failure to give the proper signals or on negligence after discovery of peril.

Clear it is that the decision of the Court of Appeals that on this record that "the jury might have inferred from the circumstances that" the engineer became aware of the decedent's peril in time to have avoided the accident and that he negligently failed to do so is contrary to the established law and indicated decisions of the Supreme Court of Alabama.

3. *The evidence was insufficient to show any negligence on the part of Petitioner as a proximate cause of decedent's death; the action of the driver of his automobile was the sole proximate cause.*

There was no element of negligence of any degree regarding the speed of the train in relation to this crossing, characterized by the Court of Appeals as "semi-rural" and carrying "reasonably heavy traffic." As aptly held by the Supreme Court of Alabama, in Atlantic Coast Line Railroad Company v. Barganier, MS, see Appendix:

> "Here the testimony relied on by the plaintiff to convict the trainmen of wantonness falls far short of showing that the crossing in question 'was a populous crossing,' nor does it show or tend to show that people were in the habit of crossing 'with great frequency' at that hour of day or that the train was being operated without signals of its approach."

See also to same effect, Rothrock v. Alabama Great Southern R. Co., 201 Ala. 308; 78 So. 84.

Under all the circumstances shown and under the clear principles exemplified in the authorities commented on above in this Argument, it readily appears that the Court of Appeals erred to the injury of Petitioner in holding that there was any justiciable issue for the jury as to

negligence on its part as the proximate cause of decedent's death.

On the contrary, the evidence clearly shows that the action of the driver of decedent's automobile was the sole proximate cause of the collision and his death. Roberts v. Louisville & Nashville R. Co., 237 Ala. 267; 186 So. 457; Hines v. Cooper, 205 Ala. 70; 88 So. 133; Atlantic Coast Line Railroad Co. v. Robins, CCA 5th, 192 F. 2d 657.

Conclusion

In conclusion, it is respectfully submitted:

1. That the decision of the Court of Appeals, Fifth Circuit, that there was any proximately causative negligence on the part of Petitioner is erroneous, is contrary to the opinions of the Supreme Court of Alabama, the United States Court of Appeals for the Sixth Circuit and its own prior opinions.

2. That a writ of certiorari should be granted and that this Court should review and reverse the decision of the Court of Appeals and remand the case to the United States District Court with directions to enter judgment for Petitioner, or, if Petitioner be mistaken in this, then to grant it a new trial.

Respectfully submitted,

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APPENDIX

Exhibit A

Section 170, Title 48, Code of Alabama of 1940:

170. (9952) (5473) (3440) (1144) (1699) (1399) Duty of engineer as to ringing bell and blowing whistle . . . The engineer or other person having control of the running of a locomotive on any railroad, must blow the whistle or ring the bell at least one-fourth of a mile before reaching any public road crossing, or any regular station or stopping place on such railroad, and continue to blow the whistle or ring the bell at short intervals, until it has passed such crossing, or reached such station or stopping place. He must also blow the whistle or ring the bell immediately before, and at the time of leaving such station or stopping place; and also immediately before entering any curve crossed by a public road, where he cannot see at least one-fourth of a mile ahead and must approach and pass such crossing at such speed as to prevent accident in the event of an obstruction at the crossing. He must also blow the whistle or ring the bell, at short intervals, on entering into, or while moving within or passing through any village, town or city. He must also, on perceiving any obstruction on the track, use all the means within his power, known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train.

Exhibit B

Jan. 3, 1952.

The State of Alabama—Judicial Department

The Supreme Court of Alabama

October Term, 1951-52

6 Div. 167.

Atlantic Coast Line Railroad Co.,
a corp.,

v.

Calvin F. Bargainer

Appeal from Jefferson Circuit Court

Brown, Justice.

The plaintiff, appellee here, sued the appellant Atlantic Coast Line Railroad Company, a corporation, its engineer Watts and its conductor Smith in charge of and operating its freight train, in trespass on the case for injury to his person and property,—a Chevrolet 1936 Model automobile, —averring as inducement that while the plaintiff was driving said automobile on August 9th, 1948, "along a public highway, known as Midfield Road, which said public highway then and there crossed said railroad track at grade near Powderly, Alabama, the defendants ran said train against plaintiff's said automobile, and as a proximate consequence thereof plaintiff was injured and damaged as follows:

(End of Page 1 of the Opinion)

"His spinal column was broken and fractured; he suffered a concussion of the brain; he was injured internally; he was permanently injured, permanently scarred and permanently disfigured; his head, neck, shoulders, back, limbs, abdomen and other parts of his

body were cut, lacerated, bruised, contused and otherwise injured; the muscles and ligaments of his back, arms, abdomen and other parts of his body were sprained, strained, torn, ruptured, wounded and otherwise injured; his nervous system was greatly shocked and impaired, was permanently [illegible] and impaired; he was rendered unconscious for a long period of time; he was confined to the hospital, to his bed and to the house for a long period of time; he was caused to suffer great physical pain and great mental anguish; he was made sick, sore and ill for a long period of time; he was prevented from engaging in his customary employment for a long period of time, and was caused to lose the remuneration which he would otherwise have received therefor; he was rendered permanently less able to work and earn money, and his ability to work and earn money was greatly impaired; he was put to great trouble, great loss of time and great expense in and about procuring medical and hospital care, medicines, and medical supplies and services in and about an effort to heal and cure his said wounds and injuries; and the body, motor, chassis, wheels, tires and other parts of his said automobile were broken, bent, mashed, torn, twisted and otherwise damaged, and his said automobile was rendered less valuable.

(End of Page 2 of the Opinion)

"And plaintiff avers that all of his said injuries and damages were caused as a proximate result of the negligence of the defendants in and about the operation of said railroad train at said time and place."

The second count adopted the first count down to and including the cataloguing of damages claimed and averred that said injuries and damages were proximately caused by defendants' wanton conduct in running its said locomotive against the plaintiff's automobile on said crossing.

The defendants pleaded to both counts the general issue, in short by consent, with leave to offer in evidence any

fact or facts which if specifically pleaded would constitute a defense to the counts of the complaint or either of them.

While Mr. Bibb, counsel for the defendant, was making the closing argument for the defendant and about the time he was concluding said argument, the plaintiff offered an amendment to his complaint by striking Smith as a party defendant and by adding the following averments, as to the damages claimed:

> "'2. By adding at the beginning of the second paragraph of Count 1 thereof, the following words: "He was so injured about the body that his sexual capacity was impaired and he was rendered unable to engage in sexual intercourse; his bladder was injured and impaired, and his hearing was impaired."'"

(End of Page 3 of the Opinion)

As soon as the amendment embodying the claim above emphasized came to the attention of defendants' counsel, he objected to said added claim on grounds, among others, that it came too late; that it was not supported by the testimony of medical witnesses; that defendants were deprived of the right to cross-examine witnesses on said subject; that defendants were deprived of the right to offer countervailing evidence and to argue the same to the jury. The court overruled the objections and allowed said amendment and the defendants separately excepted. The record shows that said amendment was proposed after Mr. Foster, one of the defendants' counsel, had presented request for charging the jury in writing, that damages for loss of sexual capacity could not be awarded because the same were "special damages", not claimed.

The trial resulted in a verdict acquitting the engineer and assessing the damages in favor of the plaintiff against the railroad company for $60,000.00 followed by a judgment of the court on said verdict.

On the hearing of the motion for a new trial duly filed, the plaintiff, to avoid the granting of the motion, at the suggestion of the trial court filed a remittitur, reducing the amount of the damages to $42,500.00 and the motion for a new trial

was overruled. The defendant railroad company duly excepted.

One of the contested issues, left for the jury decision, was whether or not under the evidence the plaintiff observed the duty imposed on him by law to stop, look and listen before attempting to cross the railroad track. On that subject, in connection with the oral charge, the court gave the following special written charges:

(End of Page 4 of the Opinion)

"Charge No. 14. The Court charges the jury that one who is about to cross a railroad track must stop so near to the track and survey by sight and sound must so immediately precede his effort to cross over it as to preclude injection of an element of danger from an approaching train into the situation between the time he stopped, looked and listened and his attempt to proceed across the track.

"Charge No. 15. The Court charges the jury that under the law it is the duty of a person intending to cross a railroad track to stop, look and listen for approaching trains, and this use of the senses must be made within such nearness to the track and under such circumstances as will afford the traveller the knowledge whether or not he can cross the track with reasonable safety from collision with an approaching train. And the Court further charges you that this duty is a continuing one to the extent of excluding the injection of an element of danger in his attempt to cross between the time he last stopped, looked and listened, if he did so, and the time he entered the zone of danger made by trains entering the crossing.

"Charge No. 25. The Court charges the jury that a failure of the defendant's servants or agents to sound the whistle or ring the bell, if such were the fact, in approaching the crossing at which the collision complained of occurred did not relieve the plaintiff, Calvin F. Barganier, of the duty of stopping his vehicle and

looking and listening for approaching trains before attempting to cross the railroad tracks.

(End of Page 5 of the Opinion)

"Charge No. 29. The Court charges the jury that if you are reasonably satisfied from the evidence that there were obstructions which interfered with the plaintiff's view of the railroad track as he approached within one hundred feet of the railroad crossing on the occasion complained of, then it was the plaintiff's duty, in the exercise of reasonable care for his own safety, to stop and to look and to listen for approaching trains at a point where he could best see and hear an oncoming train before undertaking to cross the railroad track.

"Charge No. Y. I charge you gentlemen of the jury that before entering upon the crossing Mr. Barganier was under the duty of using reasonable care in listening to determine whether or not any train was approaching the crossing.

"Charge No. 20. The Court charges the jury that the engineer or other person in charge of the train approaching the public road crossing at which the collision complained of occurred was not required to blow the whistle continuously or to ring the bell continuously but that the duty imposed on him by law was that at short intervals commencing one-quarter of a mile before reaching the crossing either the whistle be blown or the bell be rung, one of the other."

(End of Page 6 of the Opinion)

The evidence shows that while plaintiff was driving his Chevrolet automobile on the Midfield Road leading from the old Bessemer Highway across to the new Super Bessemer Highway, proceeding in a northwesterly direction between six and seven o'clock on the morning of August 9, 1948, the defendant's locomotive pulling a freight train being operated by the defendant Watts collided with said automobile just as the front wheels of the automobile reached the northwestern rail of the single line railroad

track and threw the automobile to the northwestern side of the railroad against the cross-arm sign post standing on the northwestern corner of the intersection, causing said cross-arm to lean slightly to the northwest. The locomotive contacted the right rear wheel and fender of the automobile, wrecking the same and injuring plaintiff, who was caught and pinned in some way under the running board with his feet extending to the front part of the tonneau of the automobile.

No one saw the collision except the plaintiff, the fireman and the engineer operating the train and there was no other vehicle or person in sight of the crossing at the time of the collision. The fireman's testimony, which was without dispute, was that as the train approached the crossing, he was keeping such lookout ahead as was consistent with his duties to fire the engine with coal and supply the boiler with water by operating the injector, and just before the front of the locomotive reached the crossing he saw the automobile, to use his words, "flash upon the crossing out of nowhere" and he hollered to the engineer "car" and when he saw the automobile, it was entering on the crossing. The only other employee of the defendant railroad company in a position to observe the

(End of Page 7 of the Opinion)

incident was the front brakeman, who occupied a seat by the side of the fireman's seat. He testified that he was keeping a lookout and just about the time and immediately before the collision, steam from the boiler or spray of water from the injector which was being operated clouded his glasses, so that he could not see, and while in the act of removing his glasses to clear them from their clouded condition, the locomotive came in contact with the automobile. His testimony further goes to show that he was new on this run, was not familiar with the road and did not know that there was such a crossing as Midfield Crossing.

The engineer's testimony was to the effect that he had been engaged in operating as fireman and engineer on "that run for twenty-seven years" and "was familiar with

Midfield Crossing. That he started from Elyton, the terminus near Birmingham, one day and returned the next day. His testimony further goes to show, and it is not disputed, that he was sitting at the engineer's place in the cab of the locomotive on the right-hand side, and when the engine approached the crossing and was within two hundred feet thereof, the boiler and smoke stack obscured his view of the left rail of the tracks and the left side of the road crossing; that he did not see plaintiff's automomile until it was on the crossing and the front wheels of the automobile had reached the northwest rail of the railroad tracks. His testimony is further to the effect that the bell was ringing, operated by the automatic ringer from the time he left the terminus at Elyton until he reached the crossing; that he began to blow the crossing signal a quarter of a mile down from the crossing and was blowing the last blast of the crossing signal as the car flashed in his view; that he released the whistle and immediately

(End of Page 8 of the Opinion)

applied the brakes in emergency; that nothing else could be done by an engineer to slacken the speed or stop the train.

The train consisted of the locomotive, its tender, twenty-one cars and the caboose with eight wheels to each. The engine was working steam and was making the usual noise as it approached Midfield Crossing. The evidence further shows that the firebox had been freshly fired with eight or nine scoops of coal, causing the emission of black smoke from the smoke stack. The defendant's evidence further goes to show that the train was moving about 30 miles per hour and the noise of its approach was discernible. It was daylight and the weather was clear.

The undisputed evidence shows that the crossing was in the open country, not in a thickly populated district. The nearest habitation to the crossing, so far as the evidence shows, was the plaintiff's home, which was one-third mile or more from the crossing, and a filling station on the old Bessemer Highway at the Midfield Road intersection. There was no noise other than that of the plaintiff's auto-

mobile to distract plaintiff's attention or to obscure the noise made by the train.

Appellee himself testified as to his frequent use of this crossing over a long period of time. Plaintiff's witness Mr. J. R. Bunn, examined by plaintiff's counsel, testified in this regard as follows:

"Q. You were talking about the time you came along there. About the time of day you came along there, between six and seven o'clock in the morning what was the traffic; did it have much on it then or not much or little bit or a lot?

("After Mr. Bibb's objection was overruled and an exception reserved the witness answered):

"A. I imagine it had quite a bit of traffic, people going to work from there.

(End of page 9 of the Opinion)

"Q. I am not talking about what you imagined. I am talking about what you had observed; you had been through there before?

"A. Yes; I would say quite a bit crossing at those times.

"Q. Quite a bit of traffic on it at that time of day?

"A. Yes. * * *."

Plaintiff's witness Mr. J. M. Herring testified as follows:

"Q. Is that a much used, traveled highway out there?

"A. Yes, sir."

And the defendant's conductor C. B. Smith testified as follows:

"Q. You had been familiar with that crossing over the years you have worked on that line?

"A. Yes, sir.

"Q. And at that time in the morning with people going to work out there at the Tennessee Company it is a pretty populous crossing, is it not?

"A. It has been, yes, sir.

"Q. I say about that time of morning it has had much travel by automobiles over it?

"A. At times we have seen lots, and at times not any.

"Q. At that time in the morning it is usually a good many, isn't it?

"A. I don't know.

"Q. Isn't that about the time you usually pass there?

"A. I said at times you usually get few and at times many.

"Q. Sometimes you would pass it and not see a car?

"A. Yes, sir.

"Q. You knew from your many years of experience in passing over that crossing it was a popular crossing?

"A. Yes, sir.

"Q. And a hard surface crossing?

"A. Yes, sir."

(End of Page 10 of the Opinion)

In addition to the foregoing direct evidence on the point, the evidence showed that the crossing was used by several other people. Mr. Thomas M. Bailey testified that he had used the crossing at about 6:30 A. M. every day for seven or eight years. Mr. James Henry Burgess testified that he had been using the crossing off and on for about three or four months and on this particular day he went across the crossing about 6:25 or 6:30 A. M. on his way to work. Miss Mildred Farmer had used the crossing going backwards and forward to work every day for about six years. Mr. J. L. Thomas had used the crossing off and on since 1925. Mr. C. W. Buffington had used the crossing for as long back as he could remember (he was 36 yrs. old) and for a long time he had crossed it every day. Mr. Jessie Moore had lived at Grasselli for 27 yrs. and had used the crossing lots of times. Sometimes he used it once a week and sometimes every day during the week. Mr. W. J. Leighton, an insurance agent, had used the crossing in working his debit three or four times a week for about two and one-half years. Mr. J. S. Pitts had used the crossing twice a day for a good long time prior to the accident.

The evidence further showed that the engineer Mr. Watts had been running on that line either as an engineer or a fireman for 27 years.

The evidence further showed that just off of and to the right of the Midfield Road, on which plaintiff approached the crossing commencing from 400 to 500 feet of the crossing, a bank covered with growing weeds and bushes and extending up to the right-of-way, tended to obscure or lessen visibility to the east, the direction from which the train approached the crossing, a condition observed by and known to the plaintiff. Plaintiff testified as a witness in his own behalf as follows:

(End of Page 11 of the Opinion)

"Q. Now, Mr. Bargainer, back in the summer of 1948 in traveling from your home out to the place of your employment with the Tennessee Company, did you customarily use what is known as the Midfield Road?

"A. Yes, sir.

"Q. How often did you travel that road, Mr. Bargainer?

"A. As much as twice a day or more.

"Q. How long had you been traveling the road with that regularity?

"A. Possibly three years or a little over.

"Q. Where is your place of work with the Tennessee Company, at that time?

"A. Fairfield.

"Q. Are you familiar with the place where the Atlantic Coast Line track crosses the Midfield Road between the old Bessemer Highway and the Super Highway?

"A. Yes, sir.

"Q. Is that in Jefferson County, Alabama?

"A. Yes, sir.

"Q. Now, Mr. Bargainer, on the date—by the way, you are the man who received the injuries out there on August 9, 1948, aren't you?

"A. Yes, sir; I can vouch for that.

"Q. Were you driving the automobile you were in?

"A. Yes, sir.

"Q. What kind of car was that, Mr. Bargainer?
"A. 1936 Standard Chevrolet two-door.
"Q. 1936?
"A. Yes, sir.

(End of Page 12 of the Opinion)

"Q. In going from where you lived out towards Fairfield plant, where you worked, did you travel from the old Bessemer Highway toward the Super Highway?
"A. Yes, sir.
"Q. On the date when this accident happened were you traveling in that same direction from the old Bessemer Highway toward the new Super Highway?
"A. Yes, sir.
"Q. Is that road there a hard surface road, a black top road, Midfield Road?
"A. Black top.
"Q. Black top, and it was black top at that time?
"A. Yes, sir.
"Q. About what time of day, Mr. Bargainer, the best you can tell us, would you say this accident happened?
"A. It was sometime between 6:05 or 10 and 6:20 in the morning.
"Q. You would say near 6:15?
"A. Yes, sir; because my habit of leaving the house was around 6:05 or 6:10.
"Q. How far did you live from the crossing?
"A. The way I had to go it was approximately one-third of a mile, I guess, or a little further.
"Q. Now, Mr. Bargainer, on this occasion, where did you get on Midfield Road?
"A. I would say it was toward Birmingham from my house. I turned to the left at Pierce's Filling Station.

(End of Page 13 of the Opinion)

"Q. What distance had you been on the road before you reached the crossing—maybe I can get at it that way—to come off of the old Bessemer Highway onto the road?

"A. Yes; I came onto the road.

"Q. Yes, sir; that was what I was trying to get at.

"Now, Mr. Bargainer, as you approached this particular crossing that we are talking about, I wish you would tell these gentlemen here, if you will, about what speed you were operating your automobile back, I will say, within four or 500 feet of the crossing as you approached the crossing, but before you arrived at it, about what speed were you driving?

"A. Four or 500 feet back from the crossing?

"Q. Yes, sir.

"A. I wasn't traveling over 10—between 10 and 15 miles an hour 500 feet back from the crossing, if that fast. I hadn't been over 20 miles an hour when I left home.

"Q. Did you stop your automobile before you proceeded on across?

"A. Yes, sir.

"Q. Did you bring your car to a dead stop?

"A. Yes, sir.

"Q. Did you listen?

"A. Yes, sir.

"Q. Did you look?

"A. Yes, sir.

"Q. Did you look in both directions?

"A. Yes, sir.

(End of Page 14 of the Opinion)

"Q. In what position did you stop the front of your car—I will say the front bumper of your car, in what position did you stop that front bumper with reference to the nearest rail to you?

"A. I would say within three or four feet of the first rail, the rail nearest to me.

"Q. At that time did you look up the track to your right?

"A. Yes, sir.

"Q. How far could you see the track in that direction, Mr. Bargainer?

"Mr. Bibb: We object to that question as to how far he could see the track in that direction.

"The Court: You can ask him how far he saw it.

"Q. How far did you see the track in that direction?

"A. Less than 50 feet.

"Q. Was there anything between you and a point 100 feet up that track?

"A. Yes, sir.

"Q. All right. What was it?

"A. A bank, bushes, shrubbery and grass.

"Q. When you stopped and looked, did you see any train approaching from that direction?

"A. No, sir.

"Q. Did you hear any train approaching from that direction?

"A. No, sir.

"Q. Did you hear any bell ringing?

"A. No, sir.

"Q. Did you hear any whistle blowing?

"A. No, sir.

(End of Page 15 of the Opinion)

"Q. Did you hear any locomotive working or making a noise?

"A. No, sir.

"Q. Well, after you stopped and looked and listened, what did you do then?

"A. I proceeded across the crossing.

"Q. Did you put your car in high gear?

"A. No, sir; I put it in low gear as I crossed the crossing, looking both ways, one at a time and then the other.

"Q. You were looking back and forth both ways?

"A. That is right, as I was easing on the crossing.

"Q. Easing on the crossing?

"A. Yes, sir; because it was rough.

"Q. Did you observe the train which later struck you at any time before it struck you?

"A. Yes, sir.

"Q. Where was the train when you observed it?

"A. It was approximately 250 or 300 feet from where I was sitting.

"Q. Where was the front of your automobile when you observed it?

"A. I would say the front wheels were within 18 inches of the far rail.

"Q. Was there anything between the position you were in and the train until you got within 18 inches of the far rail; if there was, what was it?

"A. It was that bank and shrubbery was in my way until my front wheels crossed the rail.

"Q. All right, sir. How long have you been driving cars, Mr. Bargainer, automobiles?

"A. Approximately 35 years.

(End of Page 16 of the Opinion)

"Q. What speed, in your judgment, were you making from the time you started up and eased out on that track until you saw the train?

"A. When I first started off I would say I wasn't going over three or four miles an hour, but I imagine when I seen that train whatever it would do in just a few minutes in low is what it did.

"Q. I was going to ask you about that.

"A. Which is approximately 10—9 or 10 miles an hour.

"Q. Your judgment is you were making nine or ten miles an hour when the train——

"A. When I was struck.

"Q. ——when the train struck you? When you observed the train, what did you do?

"A. I pushed on the accelerator to try to get out of the way.

"Q. And at that time you say in your judgment the front wheels were within 18 inches of the far rail?

"A. Within 18 inches of the far rail.

"Q. In other words, it was across the first rail, and lacked just that much being to the second rail?

"A. Lacked that much being to the second rail.

"Q. In your judgment, Mr. Bargainer, what speed was the train making?

"A. I would say it was making between 45 and 50 miles per hour.

"Q. Did the train hit your car in front of where you were sitting, even with you, or behind where you were sitting?

"A. He hit behind where I was sitting. • • •."

(End of Page 17 of the Opinion)

The plaintiff further testified on cross-examination that his automobile was between sixteen and eighteen feet in length. Plaintiff's Exhibit "C" showing a picture of plaintiff's wrecked automobile after the wreck and showing the growth on each side of the railroad right-of-way indicates that the growth stands equal to or slightly above the step or running board of the automobile and that the width on each side of the right-of-way was about that of the automobile's length from the ends of the ties outward, giving a clear view of the railroad tracks as far as the eye can see. Defendants' Exhibits 1 and 2 illustrate the same condition.

Plaintiff's Exhibit "D," the hospital chart and history of his injury and treatment in the hospital, made in due course, contains the following: "This 44 yr. old white male was in an auto hit by a train about 6:30 A. M. The pt. remembers being on the R. R. tract (track) and seeing the train. He tried to speed up to get out of the way. The pt. was knocked unconscious and the next thing he knew he was in the ER (Emergency Room). • • •."—§ 415, Tit. 7, Code of 1940.

The appellee insists that the evidence presented a case for the jury under both counts of the complaint. To this we do not agree. Under repeated rulings here, the plaintiff's testimony that he stopped, looked and listened, in the face of the circumstances that if he had stopped, looked and listened he could have either heard or seen the train which was moving toward the crossing and near thereto when the plaintiff drove his automobile on the railroad track, does not constitute a conflict in the evidence, under the circumstances hereinafter stated. Peters v.

Southern R. Co., 135 Ala. 533, 33 So. 332; Southern Ry. Co. v. Irvin, 191 Ala. 622, 68 So. 139; Central of Georgia Ry. Co. et al. v. Graham, 218 Ala. 624, 119 So. 654.

(End of Page 18 of the Opinion)

The evidence is without dispute that the trainmen used all means at hand to check the speed of the train and to stop it as soon as they became aware of the plaintiff's peril. Louisville & N. R. Co. v. Sunday, 248 Ala. 597, 28 So. 2d 796.

The high bank along the right side of the highway, with the growth of weeds and bushes, imposed on the plaintiff the duty of using greater precautions to ascertain that he could proceed with safety, before driving his automobile on to the railroad track. Memphis & Charleston R. Co. v. Martin, 117 Ala. 367, 383, 23 So. 231; Highland Ave. & Belt R. Co. v. Sampson, 91 Ala. 560, 8 So. 778.

There is no doubt but what the train was moving toward the crossing and was near to it when the plaintiff drove up to the railroad tracks. The evidence further showed it was broad daylight and the train was making the usual noise and emitting black smoke and if the plaintiff had stopped, looked and listened in the space of the railroad right-of-way, he could have seen and heard the approaching train. To give credence to his testimony overtaxes judicial credulity. Peters v. Southern R. Co., 135 Ala. 533, 33 So. 332; Louisville & N. R. Co. v. Simmons, 251 Ala. 131, 36 So. 2d 460; Shelton v. Hacelip, 199 Ala. 535, 74 So. 950.

The doctrine holding trainmen and their employers liable to "by passers" for personal injuries and property damage proximately caused by their wantonness in handling railroad trains on their own tracks and rights-of-way is applicable alike to trespassers on the railroad track and those who are not trespassers, who merely exercise their right to cross the tracks in thickly populated districts, whether it

(End of Page 19 of the Opinion.

be an unguarded public road crossing, private crossing or in spaces between where no crossway is provided.

The court, dealing with the wanton count in Peters v. Southern Railway Co., 135 Ala. 533, 33 So. 332, observed:

> "It has been repeatedly held before one can be convicted of wantonness the facts must show that he was conscious of his conduct, and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences, he consciously and intentionally did some wrongful act, or omitted some known duty, which produced the injury. M. & C. R. R. Co. v. Martin, 117 Ala. 367; Benson v. L. & N. R. R. Co., 116 Ala. 198; Birmingham R. Co. v. Bowers, 110 Ala. 328; A. G. S. R. R. Co. v. Hall, 105 Ala. 599; Anniston Pipe Works Co. v. Dickey, 93 Ala. 418; and other cases might be cited. There was no evidence of knowledge on the part of defendant's engineer, or, as for that matter of any other person on the locomotive, of plaintiff's peril or presence on the track, or knowledge of existing conditions at the time and place of the accident, that injury would likely or probably result to the plaintiff or any one else from the speed at which the train was being run. The general charge for the defendant under the first count, we think, was properly given."

Simple negligence, "the inadvertent omission of duty," is not an element of wantonness. McNeil v. Munson S. S. Lines, 184 Ala. 420, 63 So. 992.

In Ga. Pacific Railway Co. v. Lee, 92 Ala. 262 (272), 9 So. 230, the court speaking through Justice McClellan observed:

> "* * * The doctrine is not based on the idea that they ought to have sooner observed the danger, however, but on the ground that they knew of its existence —of the presence of people in positions of peril, as a matter of fact, without seeing them at all in the particular instance. We fully

(End of Page 20 of the Opinion)

subscribe to this doctrine, but deny its application in the case at bar. Some of the evidence went to show that this train was running at from fifteen to twenty-five miles an hour, and that no signals were being given. But, conceding that such a rate of speed and such absence of warnings might stand for recklessness and wantonness in approaching a crowded thoroughfare, the locality here involved is not shown by any tendency of the evidence to have been of that character. At most, it was the crossing of a considerably travelled public road over the railway, and there was nothing in the situation, assuming that it was well known to the trainmen, to justify the imputation to them of a consciousness that a natural or probable result of their conduct would be the infliction of injury to persons or property at that point. * * *."

And again in Nave v. Alabama Great Southern Railroad Co., 96 Ala. 264 (267-269), 11 So. 391, Justice Coleman speaking for the court said:

"The rule declared in Glass v. Memphis & Charleston Railroad Co., 94 Ala. 581, is as follows: 'One who is injured in consequence of being negligently on a railroad track can not recover, unless the railroad employees are guilty of such gross negligence or recklessness as amount to wantonness or an intention to inflict the injury; and that this wantonness and intention to do wrong can never be imputed to them, unless they actually know (not merely ought to know), the perilous position of the person on the track, and with such knowledge, fail to resort to every reasonable effort to avert disastrous consequences. And this doctrine applies as well to densely populated neighborhoods in the country, and to the streets of a city or town, as to the solitude of the plains or forest.'

(End of Page 21 of the Opinion)

"The rule is further stated in Geo. Pac. Railway Co. v. Lee, 92 Ala. 271, as follows: 'The failure to keep

a lookout, which it was the duty of defendant's employees to maintain, and which would sooner disclose the peril of the driver and plaintiff's wagon and team, even conceding that such would have been the case, was at the most mere negligence, inattention, inadvertence'; * * * that 'the purpose to accomplish a given result can not be imputed to mental conditions the very essence of which is the absence of all thought on the particular subject.'

"The proposition declared in the citation from the case of Glass v. Memphis & Charleston Railroad Co., that 'wantonness and intention to do wrong can never be imputed to them unless they actually know, not merely ought to know,'' must be taken in connection with, and as limited, in the case of Ga. Pac. Railway Co. v. Lee, 92 Ala. 271, to the effect, 'That to run a train at a high rate of speed, and without signals of approach, at a point where the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district or a city, or where the public are wont to pass on the track with such frequency and in such numbers, facts known to those in charge of the train, as that they will be held to a knowledge of the probable consequences of maintaining great speed without warning, so as to impute to them reckless indifference in respect thereto, as would render their employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured, and no fault on the part of the servants after seeing the danger. The doctrine is not based on the idea that they ought to have sooner observed the danger, but on the ground that they knew of its

(End of Page 22 of the Opinion)

existence, of the presence of people in positions of peril as a matter of fact, without seeing them at all in the particular instance.' ''

And again in Highland Ave. & Belt R. Co. v. Robbins, 124 Ala. 113 (117), 27 So. 422, the court observed:

> "This doctrine was again, and more recently, considered and approved in Haley v. Kansas C. M. & B. R. Co., 113 Ala. 640, where it was said: 'There is no reason why this doctrine does not apply as well to densely populated neighborhoods in the country, when the conditions exist * * * (to call it into exercise) as to cities, towns and villages. It is the likelihood of peril to the safety of passers-by, known to defendant's employees, that makes the duty, and not the place itself. Nave's and Lees cases, supra'; M. & C. R. Co. v. Martin, 117 Ala. 367."

This doctrine was reaffirmed and applied in Louisville & N. R. Co. v. Heidtmueller, 206 Ala. 29, 89 So. 191, on the authority of Highland Avenue & Belt Railroad Co. v. Robbins, supra, and the statement noted below in the opinion in Southern R. Co. v. Stewart, 179 Ala. 304, 60 So. 927, that such frequent use "must co-exist with the proximity of a populous city or village," was pronounced dictum. Chief Justice Anderson, the writer of the majority opinion in the Heidtmueller case, supra, after stating the substance of what the evidence showed, held that the neighborhood at the place of the catastrophe was not so populous and the use of the railroad tracks was not so constant and continuous as to charge the engineer with knowledge of the presence of persons on the railroad tracks in a place of peril, and held that the defendants were due the affirmative charge.

(End of Page 23 of the Opinion)

The statement of the doctrine relative to liability for wanton injury or damage in paragraph [1] of the opinion in the case of Central of Georgia R. Co. v. Pope, 221 Ala. 145, 127 So. 835, is quoted from the opinion in Georgia Pac. Railway Co. v. Lee, 92 Ala. 271, 9 So. 230, and there is nothing inconsistent or in conflict therein with the cases cited above.

In Northern Alabama Ry. Co. v. McGough, 209 Ala. 435 [436], 96 So. 569, the court speaking through Chief Justice Anderson observed:

> "This case went to the jury on the third or wanton count alone, and there was sufficient evidence to justify the submission to them and to support the verdict for the plaintiff under said count. True, the speed of the train alone at the point in question did not constitute wantonness, but when accompanied with evidence showing that the point of injury was a populous crossing, and that people were in the habit of crossing with great frequency at this time of year and hours of the day, and that the train was operated without signal or warning, there being proof from which the jury could infer that the enginemen were conscious of conditions and probable injury, the plaintiff made a case for the jury. * * *." [Emphasis supplied.]

The utterances quoted differentiates the case at bar from the McGough case. Here the testimony relied on by the plaintiff to convict the trainmen of wantonness falls far short of showing that the crossing in question "was a populous crossing", nor does it show or tend to show that people were in the habit of crossing "with great frequency" at that hour of the day or that the train was being operated without signals of its approach. In addition

(End of Page 24 of the Opinion)

to what we have heretofore stated, before the witness Dull reached the scene of the collision the train had been stopped, with the locomotive standing about one thousand feet from the crossing and the engineer had left his cab and walked back to the crossing and he and the conductor were trying to relieve the plaintiff when said witness drove up in his car. Several minutes later others came along, but not with "great frequency". It cannot be assumed that the learned Chief Justice and his associates used the word "populous" in a judicial opinion without comprehending the force of its

meaning. See Webster's New International Dic., 1946 Ed., p. 1921.

We are, therefore, of opinion that the trial court erred in refusing the defendant's affirmative charge as to the wanton count.

There is not a scintilla of evidence going to show that the fireman Davenport, the brakeman or conductor were guilty of negligence or wantonness and the effect of the verdict acquitting the engineer also acquitted the defendant of liability. Walker v. St. Louis-San Francisco Ry. Co., 214 Ala. 492, 108 So. 388; Southern Railway Co. v. Lockridge, 222 Ala. 15, 130 So. 557; Southeastern Greyhound Lines v. Callahan, 244 Ala. 449, 13 So. 2d 660; Waters v. Anthony, 54 So. 2d 589.

The statute requires railroad companies to set up cross-arms of warning at public crossings, notifying all desiring to cross to look out for trains, and also requires the engineer operating the train over a crossing to blow the whistle or ring the bell and to keep a lookout for persons traveling on the highway. The failure to comply with these statutes is simple negligence. The basis for the doctrine of "stop, look and listen" is rested upon the fact that the railroad company in the operation of its trains has the

(End of Page 25 of the Opinioin)

right-of-way over its tracks and a failure to stop, look and listen before entering upon a crossing is contributory negligence which bars a right of recovery for simple negligence.

Section 239, Title 7, Code of 1940, makes liberal provision for allowing amendments to the complaint in actions at law as a matter of right, but said section in its concluding sentence provides: "But the court shall have the right to refuse the allowance of any amendment to the complaint after the conclusion of the argument, when in its judgment the completion of the trial of the cause would be unreasonably delayed, or when in its judgment injustice would result." [Emphasis supplied.]

This sentence of the statute invests the trial court with broad discretion in allowing amendments, reviewable on

appeal for abuse, if the allowance is calculated to work injustice. The defendant had the right to rely on the settled trial practice that special damages not claimed (2 Mayfield's Digest, p. 1028, § 13), though some evidence of such damage is adduced, may be eliminated by requesting written instructions to the jury. Waters et al. v. Weintraub, 52 So. 2d 510. The effect of allowing the amendment of the complaint by claiming special damages for loss of sexual capacity just as counsel for defendant was closing the last argument to the jury was to deprive the defendant, not only of the right to offer countervailing evidence, but of the right to examine plaintiff's expert medical witnesses as to the claim for special damages and to argue the question to the jury. This is a part of due process and constituted reversible error.

For the errors noted above the judgment of the circuit court is reversed and the cause is remanded.

(End of Page 26 of the Opinion)

The Per Curiam opinion follows the dissenting opinion of Justice Thomas rather than the majority opinion written by Chief Justice Anderson in Walker v. St. Louis-San Francisco Ry. Co., 214 Ala. 492, 108 So. 388.

Reversed and remanded.

Livingston, C. J., Foster, Lawson, Simpson and Stakely, JJ., concur in the result, as stated in the Per Curiam opinion which follows.

Per Curiam.

We concur in the result reached by Judge Brown, but there are some features of his opinion which we cannot approve.

We agree that the affirmative charge should have been given for defendant on both the simple negligence and wanton counts for reasons which we will explain.

We think with the opinion of Judge Brown that as to the simple negligence count, the evidence shows without real conflict that plaintiff was negligent in respect to the stop, look and listen principle which proximately contributed to his injury, and therefore he cannot recover on that count.

Southern Ry. Co. v. Randle, 221 Ala. 435, 128 So. 894; Southern Ry. Co. v. Summers, 232 Ala. 417, 168 So. 179; Louisville & N. R. Co. v. Griffin, 240 Ala. 213, 198 So. 345; Atlantic Coast Line R. Co. et al. v. Flowers, 241 Ala. 446, 3 So. 2d 21.

But we cannot agree with all that is said in his opinion as to the wanton count. That count charged the proximate cause of the injury of plaintiff to be defendants' wanton conduct in running of its locomotive against plaintiff's automobile on said crossing. Judge Brown calls that count trespass on the case. We cannot agree with that theory. The wantonness is charged to the defendants,—all of them. It is not a charge to the servants or agents of the

(End of Page 27 of the Opinion)

railroad company for which it is responsible, which would be case as to it. But the charge is that defendant railroad company did the wanton act, as well as the defendant Watts. The liability of the railroad is not alleged to be dependent on the wantonness of Watts. They are sued as separate persons jointly and severally participating in the wanton act. That makes a trespass as to them both. City Delivery v. Henry, 139 Ala. 161, 34 So. 389; Birmingham Ry. Lt. & Pr. Co. v. Hayes, 153 Ala. 178 (8), 189, 44 So. 1032; Central of Georgia Ry. Co. v. Freeman, 140 Ala. 581, 37 So. 387; Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 44 So. 627; Ex parte Louisville & N. R. Co., 203 Ala. 328, 83 So. 52; Southern Ry. Co. v. Beaty, 212 Ala. 608, 103 So. 658; National Baking & Lunch Co. v. Wilson, 198 Ala. 90, 73 So. 436; Louisville & N. R. Co. v. Abernathy, 197 Ala. 512, 73 So. 103; W. E. Belcher Lumber Co. v. York, 245 Ala. 286, 17 So. 2d 281. Under that count a discharge of Watts does not acquit the railroad company. § 139, Title 7, Code; Waters et al. v. Anthony, 252 Ala. 244, 40 So. 2d 316.

The evidence does not show that the railroad company directed, authorized or ratified the act of its trainmen on that occasion or otherwise directly participated in the wanton injury. It is, therefore, entitled to the affirmative charge notwithstanding the Act of October 9, 1947, p. 513

[§ 138 (1), Title 7, Code of 1940, Pocket Part], which we are now holding does not change that principle, though it in terms undertakes to do so. See our case of Sibley v. Sibley, 6 Div. 158 [M. S.].

(End of Page 28 of the Opinion)

We do not wish to say however that we disagree with the conclusion that the evidence is not sufficient to support a claim of wantonness on that occasion by the trainmen of the railroad company.

We need not express an opinion as to the allowance of the amendment to the complaint. That question is not likely to arise on another trial.

(End of Page 29 of the Opinion)

FILED
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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 657.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

RILLA MAE FREEMAN, Administratrix, Etc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Rilla Mae Freeman, Administratrix, Etc., Respondent, in Opposition.

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INDEX.

Page

Opinion below..... 1

Statement of the matter involved..... 2

Statement of the case by respondent..... 2

Statement of the pleadings and the evidence..... 5

Points of law..... 19

Argument 28

Certificate of service..... 51

Cases Cited.

Alabama Great Southern R. R. Co. v. Bolton, 7 So. (2d) 296, 242 Ala. 562.....23, 42

Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 51, 9 So. 303, 30 Am. St. Rep. 28..... 27

Alabama Great Southern v. Moundville Motor Co., 4 So. (2d) 305, 241 Ala. 633.....22, 23, 41

Ala. G. S. R. Co. v. Sellers, 93 Ala. 9, 15, 9 So. 375, 30 Am. St. Rep. 17..... 27

Alabama Power Co. v. Goodwin, 210 Ala. 657, 658, 99 So. 158..... 27

Alabama Power Co. v. Ickes, 58 Sup. Ct. 300, 302 U. S. 464 19

Anderson v. Abbott, 64 Sup. Ct. 531, 535, 321 U. S. 349 19

Atlantic Coast Line R. Co. v. Brackin, 28 So. (2d) 193 .....22, 35, 36

Atlantic Greyhound Corp. v. Crowder, 177 Fed. (2d) 820 21

Baker v. Schofield, 37 Sup. Ct. 333, 333, 244 U. S. 144.. 19

Bessemer Liquor Co. v. Tillman, 139 Ala. 462, 36 So. 40 25

Birmingham R. L. & P. Co. v. Rutledge, 142 Ala. 195, 204, 39 So. 338 27
Brewer Oil Co. v. United States, 43 Sup. Ct. 60, 63, 260 U. S. 77, 86 19
Brown & Flowers v. Central of Ga. R. R. Co., 197 Ala. 71, 72 So. 366 20

Central of Ga. R. Co. v. Bates, 225 Ala. 519, 521, 144 So. 9, 11 26
Central of Ga. Ry. v. Ellison, 199 Ala. 571, 75 So. 159 ..... 23, 40, 45
Central of Ga. R. R. Co. v. Foshee, 125 Ala. 199 ... 20, 24, 26
Central of Georgia Railway Co. v. Motherwell, 227 Ala. 300, 149 So. 820 45
Chesapeake & O. R. Co. v. Meyer, 150 Va. 656, 143 S. E. 478 24
Chicago Great Western Ry. Co. v. Beecher, 150 Fed. (2d) 394, Cert. Den. 66 Sup. Ct. 339, 326 U. S. 781, 90 L. Ed. 473 21
Chicago & N. W. Ry. Co. v. Burnham, 124 Fed. (2d) 842, 846 39
Chicago & N. W. Ry. Co. v. Golay, 10th C. C. A., 155 Fed. (2d) 842 21
Chicago, M. & S. P. R. Co. v. Winstanley, 73 Wisconsin 375, 39 N. W. 856 24
City Delivery v. Henry, 139 Ala. 161, 34 So. 389 31
Conn v. Penn, 18 U. S. 424, 5 Wheat. 424, 5 L. Ed. 125 ..... 20, 34
Cross v. Ryan, 124 Fed. (2d) 883, 887 25

Fayet v. St. Louis & S. F. R., 81 So. 671, 203 Ala. 3 36
Fontes v. Porter, 156 Fed. (2d) 956 ..... 20, 34
France Manufacturing Co. v. Jefferson Electric Co., 106 Fed. (2d) 605, Cert. Den. 60 Sup. Ct. 471, 309 U. S. 657, 84 L. Ed. 1006, Rehearing denied 60 Sup. Ct. 589, 309 U. S. 696, 84 L. Ed. 1036 ..... 20, 34
Frierson v. Gulf, Mobile & Ohio R. R. Co., 48 So. (2d) 170 20

General Electric Co. v. Wagner Electric Manufacturing Co., 123 Fed. 101, Affmg. 130 Fed. 772, 66 C. C. A. 82 ..... 21, 34
Grand Trunk Western Ry. Co. v. Heatlie, 48 Fed. (2d) 759 ..... 21, 39
Grauer v. Alabama Great So. R. Co., 96 So. 915, 209 Ala. 568..... 22
Graver Tank & Mfg. Co. v. Linde Air Products Co., 69 Sup. Ct. 535, 538, 336 U. S. 271..... 19
Greyhound Lines v. Callahan, 13 So. (2d) 660, 244 Ala. 449 25
Gulf, Mobile & O. R. Co. v. Sanders, 51 So. (2d) 531, 532 34
Highland Ave. Belt R. Co. v. Robbins, 124 Ala. 113, 27 So. 422, 82 Am. St. Rep. 152..... 22
Johnson v. Louisville & N. R. Co., 227 Ala. 103, 110, 148 So. 822, 828..... 25
Kansas City Life Ins. Co. v. Bowns, 129 Fed. (2d) 289 ..... 20, 34
Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 309, 13 So. 57..... 27
Kinser v. Riss & Co., 177 Fed. (2d) 316, 317..... 24
Larson v. Chicago & N. W. Ry. Co., 171 Fed. (2d) 841, 64 C. J. 1081..... 25
Louisville & Nashville R. R. Co. v. Calvert, as Admr., 172 Ala. 597, 55 So. 812..... 23, 25, 45
Louisville & Nashville Ry. Co. v. Lloyd, 186 Ala. 119, 6 So. 153..... 23
Louisville & N. R. Co. v. Robinson, 141 Ala. 325, 331, 37 So. 431, 432..... 26
Louisville & N. R. Co. v. Rush, 22 Ala. App. 195, 114 So. 21, 22..... 26
Louisville & N. R. Co. v. Scott, 23 Ala. App. 132, 122 So. 184, 185..... 26, 46
Louisville & Nashville R. R. Co. v. Sullivan, 13 So. (2d) 877, 880, 244 Ala. 485..... 22, 23, 24, 45

Louisville & Nashville R. Co. v. York, 128 Ala. 305, 30 So. 676 (12) 21, 39, 48, 49
Louisville & N. R. Co. v. Young, 153 Ala. 232, 236, 45 So. 238, 239, 16 L. R. A. (N. S.) 301 25

Manley v. B. R. L. & P. Co., 191 Ala. 531, 534, 68 So. 60 26
Maryland Casualty Co. v. Cushing, 171 Fed. (2d) 257 .. 21
Miles v. Hines, 205 Ala. 83, 87 So. 837 ..... 20, 22, 23, 24
Miller v. Advanced Transportation Co., 126 Fed. (2d) 442 25
Mobile J. & K. C. R. Co. v. Smith, 153 Ala. 127, 45 So. 57, 127 Am. St. Rep. 22 22
Mobile L. & N. R. Co. v. Gadik, 211 Ala. 582, 584, 100 So. 837 25
Mobile L. & R. Co. v. Logan, 213 Ala. 672, 674, 106 So. 147, 149 25

Nashville, C. & L. Ry. v. Prince, 103 So. 463, 212 Ala. 499 ..... 21, 39, 48, 49

Palmer v. Hoffman, 63 Sup. Ct. Rep. 477, 318 U. S. 109, 87 L. Ed. 645 ..... 19, 24
Pollard v. Nicholls, 99 Fed. (2d) 955, 65 So. 153 .. 23, 24, 47
Pollard v. Stewart, 168 So. 203, 27 Ala. App. 116, Cert. Den. 168 So. 205, 232 Ala. 453 22
Propper v. Clark, 69 Sup. Ct. 1333, 1341, 1342, 337 U. S. 472 19

Randle v. Birmingham Ry., Light & Power Co., 185 Ala. 532, 48 So. 114 ..... 23, 26, 42
Richmond & D. R. Co. v. Freeman, 97 Ala. 289, 292, 11 So. 800 27

Sands v. Louisville & N. R. Co., 156 Ala. 323, 326, 47 So. 323 26
Seaboard Air Line R. Co. v. Laney, 199 Ala. 654, 657, 75 So. 15 26
Snider v. Ala. G. S. R. Co., 210 Ala. 119, 122, 97 So. 209, 210 25

Southern Ry. Co. v. Dear, 26 Ala. App. 508, 162 So. 685 ..... 23, 26, 45
Southern Ry. Co. v. Shelton, 136 Ala. 191, 34 So. 194 ..... 23, 24, 40
Southern Ry. Co. v. Sherrill, 167 So. 731, 232 Ala. 184 ..... 23, 42
Southern Ry. Co. v. Williams, 243 Ala. 429, 10 So. (2d) 273 ..... 23, 45
So. & No. Ala. R. Co. v. Sullivan, 59 Ala. 282..... 26
Spiegel's Estate v. C. I. R., 69 Sup. Ct. 301, 304, 335 U. S. 701..... 20
Starr Jobbing House v. May Hosiery Mills, 93 So. 572, 207 Ala. 620..... 25
Thompson & Donahoo v. Mobile & O. R. Co., 211 Ala. 646, 101 So. 441..... 23
Thompson v. Mobile & O. R. Co., 211 Ala. 646, 647, 101 So. 441..... 25
U. S. v. Johnson, 45 Sup. Ct. 496, 268 U. S. 220..... 19
Union Pacific Ry. Co. v. Burnham, 124 Fed. (2d) 500.. 21
Washington Asphalt Block & Tile Co. v. Mackey, 15 App. D. C. 410..... 25
Wilhite v. Webb (Ala.), 46 So. (2d) 414.....24, 48
Williams v. Roche Undertaking Co., 49 So. (2) 902.... 23

Textbooks Cited.

44 Am. Juris. 747, p. 507..... 22
44 Am. Juris. 753, p. 512..... 22
Wigmore on Evidence, 3rd Ed., Vol. 11, Sec. 664, p. 778, 1947 Pocket Supp. to Vol. 11, p. 119.....21, 39

Statutes Cited.

Sec. 138-1, Title 7, Code of 1940, Pocket Part..... 31
Section 1254 (1) of Title 28, United States Code, Rule 38, Para. 5 (b)..... 28

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 657.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

RILLA MAE FREEMAN, Administratrix, Etc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Rilla Mae Freeman, Administratrix, Etc., Respondent, in Opposition.

OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit was filed December 14, 1951, application for rehearing was denied January 18, 1952 (Rec. p. 244), and is reported in 193 Fed. 2d 217 (Fed. Rep. Sup., dated February 18, 1952).

STATEMENT OF THE MATTER INVOLVED.

The only matter involved in this case is whether or not the trial court correctly submitted the plaintiff's complaint to the jury and was correct in denying the defendant's motion for a new trial when judgment was rendered in favor of the plaintiff.

STATEMENT OF THE CASE BY THE RESPONDENT.

As its statement of the case this respondent adopts the findings of fact set out in the opinion of the Court of Appeals here sought to be reviewed as follows:

> "Appellee, as administratrix of her husband's estate, recovered judgment below against the appellant railroad awarding her damages for the husband's wrongful death, which occurred when an automobile driven by one Brock King, in which deceased was riding as a guest, collided with a train alleged to have been negligently operated by appellant.
>
> "The collision occurred about 8:22 a. m. on January 14, 1950, a foggy, misty morning, with light drizzling rain, where appellant's single main line track intersects a state highway at right angles near Powderly, Alabama, just outside the southerly city limits of Birmingham. The train was about 10 minutes behind schedule. The crossing is in semi-rural territory, but near several populous areas. The highway, which connects the towns of Midfield and Fairfield, is paved 21 feet wide and carries reasonably heavy traffic. At the crossing, there is a conventional crossarm crossing sign, plainly visible to a car approaching from the north, but no other protective devices.
>
> "The automobile in which deceased was riding approached the crossing from the north, traveling south

at a speed of 25 to 35 miles per hour. The train approached from the east, or left side of the automobile, at a speed of about 45 miles per hour. As it approached the crossing, the automobile did not reduce its speed. Although the engineer testified he applied the emergency brakes as soon as he discovered the oncoming automobile, the train's speed was reduced very little before the collision. The automobile had almost cleared the crossing when it was struck on its left rear by the left pilot step on the front of the locomotive. After striking the automobile, the engine became uncoupled from the cars, apparently as a result of the impact, and traveled about 600 feet beyond the crossing before stopping.

"The approaches to the crossing of both highway and railroad were straight. To one looking straight ahead down the highway, or straight down the railroad track, there is a clear view of the crossing itself from a substantial distance away. From the east, however, the railroad track approaches the crossing through a shallow 'cut,' on the sides of which are low banks. On the top of these banks, and in the area to the north and east of the crossing, there were trees and rather dense weeds and other growth, so that an automobile driver approaching the crossing from the north would not have a clear view of a train approaching from the east, nor would the engineer of the train have a clear view of the approaching automobile, until the train and automobile were quite close to the crossing. Even in winter, with foliage greatly reduced, the trunks of the trees and the stems of thickly grown weeds and bushes obscure the view to the northeast of the crossing, across which area the engineer and driver of the car would have to look in order to see each other a substantial distance back from the crossing.

"The engineer testified that he had a clear view of the crossing straight down the track from a quarter of a mile or more away, and started blowing a crossing signal and turned on the automatic bell ringer at about that point, continuing the signals until he reached the crossing. He was corroborated by several witnesses as to the crossing signals, but there was testimony to the contrary. The driver of a car following close behind the car involved in the collision heard the whistle, and safely stopped his car before reaching the crossing. The engineer further testified that he did not see the car involved in the collision until the car was between 50 and 75 feet, and the locomotive between 75 and 100 feet, from the crossing, at which time he applied the emergency brakes and did all in his power to stop the train. His failure to see the car earlier may have been due to the obstructing vegetation to the northeast of the crossing.

"The cause was submitted to a jury, which found for the plaintiff. Asserting that the negligence of the driver of the automobile, Brock King, was the sole proximate cause of the collision, appellant contends that its motion for a directed verdict, or in the alternative its motion for a new trial, should have been granted, and that denial of these motions was error."

At the conclusion of the evidence on the trial the petitioner filed a general motion for a directed verdict (Rec. p. 167) upon which the court reserved its ruling; there was no motion made by petitioner at the close of the evidence for a directed verdict, separately and severally, as to each separate and several ground contained in the complaint. After verdict and judgment for plaintiff, defendant's motion for new trial was overruled (Rec. pp. 193-194). The Court of Appeals held no error in trial court's submission of case to jury.

STATEMENT OF THE PLEADINGS AND THE EVIDENCE.

This cause was tried in the court below upon the original complaint, containing four counts, two of which charged simple negligence, and, by operation of law, subsequent negligence, one of which charged subsequent negligence and one of said counts charged wantonness (Rec. pp. 1, 2, 3, 4, 5). The appellant's answer to the separate and several counts of the complaint set forth three separate and several defenses (Rec. pp. 6-7). Appellant's first defense was that the complaint failed to state a claim against the defendant; the second defense admitted that appellant was a corporation and that on, to-wit, the 14th day of January, 1950, a collision took place between an automobile of which the deceased, Murphy Hill Freeman, was an occupant, and appellant's train, being operated by its employees, at the place where a public road, generally known as "Midfield Road," crosses appellant's tracks in Jefferson County, Alabama, and that in said collision Murphy Hill Freeman received injuries from which he died a short time thereafter on January 14, 1950. The appellant, in the second defense, denied all other allegations contained in the complaint and the several counts thereof. The appellant's third defense was that appellee's intestate was guilty of contributory negligence which proximately contributed to cause his injury and death.

The evidence adduced upon the trial of this cause tended to show that the death of the appellee's intestate, Murphy Hill Freeman, resulted from a collision occurring on January 14, 1950, at approximately 8:22 a. m., between a locomotive and train of cars owned and operated by the appellant, Atlantic Coast Line Railroad Company, and an automobile in which the deceased was riding as a passenger (Rec. p. 26); that the collision occurred at a point where the appellant's railroad tracks cross the Midfield-

Fairfield Highway, a public crossing in Jefferson County, Alabama, used with great frequency at all times by the general public (Rec. pp. 24-25-26, 33, 42-43-44-45); that the point on the appellant's tracks where the fatal collision occurred is between the City of Birmingham and the City of Bessemer and just barely without the corporate limits of the City of Birmingham; that the Midfield-Fairfield Highway is a paved highway (Rec. p. 24) leading in one direction from the crossing to the Bessemer-Birmingham Super-Highway and thence to Fairfield and in the opposite direction to Powderly and the South Bessemer Highway (Rec. p. 25); that the crossing is surrounded by populous communities (Rec. pp. 42, 33, 23, 44); that there was a factory located nearby (Rec. p. 62). The character of the crossing was not made an issue by appellant upon the trial of this cause as the appellant conceded that it was a populous crossing, used with great frequency by the traveling public, and had been so used for a long time prior to the date of the collision in question (Rec. p. 45). The trial judge so ruled and in this ruling the appellant acquiesced. No testimony was introduced to the contrary and no contention to the contrary was made upon the trial.

The train consisted of a locomotive and three cars, a mail and express car, a passenger and baggage car and a passenger car. The engine was in the neighborhood of sixty or sixty-five feet long and the cars were each seventy feet long (Rec. pp. 146, 142). At the time of the collision appellant's train was traveling from Birmingham to Bessemer (Rec. p. 69), and the automobile in which appellee's intestate was riding as a passenger was traveling on the Midfield-Fairfield Highway from the direction of Midfield, the Birmingham-Bessemer Highway and Fairfield and approached the crossing on the engineer's side, or right side of the locomotive (Rec. pp. 72, 137). The appellant's railroad track, at the point where the collision occurred, crosses the highway at a right angle (Rec. pp. 69, 138).

The undisputed evidence was that the left pilot step of the locomotive hit the extreme rear end of the automobile (Rec. pp. 77, 105); that the automobile in which appellee's intestate was riding as a passenger was almost completely across appellant's railroad tracks when the collision occurred (Rec. p. 60).

Mr. Herbert Foster testified that he was a resident of 325 McPherson Avenue in Midfield and had been a resident of Jefferson County for approximately one year prior to the collision and was employed by the United States Department of Agriculture (Rec. p. 27). This witness further testified that immediately prior to and at the time of the collision he was behind the automobile in which appellee's intestate was riding, following it at a distance of from fifty to seventy-five feet (Rec. p. 29); that the automobile was approximately one hundred feet from the railroad tracks when he first observed it and that the train was around two hundred feet from the crossing when he first observed the train prior to the collision. This witness further testified that when he first saw the train two hundred feet from the crossing the automobile occupied by deceased was around fifty feet from the crossing and was traveling around fifteen or twenty miles an hour and did not increase or decrease its speed at any time from the first time he observed the automobile until the time of the collision (Rec. p. 30). This witness testified further that the train did not reduce its speed at any time prior to the collision from the time he first observed the train until the time of the impact and that the automobile had just almost made it across the track when the collision occurred (Rec. p. 31). According to the testimony of the witness the automobile came to rest around seventy-five to one hundred feet from the crossing after the collision (Rec. p. 32). According to the further testimony of Mr. Foster it was, at the time of the collision, drizzling rain and foggy to a certain extent (Rec. p. 32). Mr. Foster testified that

his attention was first attracted to the train by a blast of the whistle and that he did not hear the whistle blow prior to that time (Rec. p. 34). He testified that there was no wig-wagger or flasher protecting the crossing and no lights or other indication of danger other than a cross and that he did not hear the bell on the train ring at any time (Rec. p. 37). According to the witness the train was two hundred feet from the crossing at the time when the automobile was fifty feet from the crossing and when he heard the train whistle blowing for the first time the automobile was fifty feet from the crossing (Rec. p. 49).

Sylvester Penny, upon being called as a witness by the plaintiff, testified that at the time of the collision he was near the crossing, walking along the railroad tracks. This witness testified that prior to the collision he had walked up the tracks in the direction from which the train approached the crossing about seventy-five or eighty feet on the engineer's side and that upon observing the train approaching him, he crossed over to the fireman's side of the track and observed the collision (R. p. 47). According to the testimony of Sylvester Penny, after the train passed he heard the whistle blow several times real fast like, "toot, toot, toot, something like that" and turned around (Rec. p. 50) and saw the automobile tumbling (Rec. p. 48). This witness testified that he had formerly worked for the railroad and was familiar with the noise or racket that brakes made when they are applied upon trains (Rec. p. 48), and that he did not hear the brakes applied at any time from the time he first saw the train until the time when he saw the automobile tumbling. The witness stated that he was standing about five feet from the tracks as the train passed him and was walking along just in the clearance where the train could pass him (Rec. p. 53). He testified further that he did not hear any bell on the engine ring prior to the collision (Rec. pp. 48, 55). According to this witness he went back to the scene of the

collision after the collision and rendered whatever assistance he was able to give and that during the time he was there at the scene, after the collision occurred, the train was backed up from the point where it had come to a stop after the collision and that he heard the bell ring, while the train was being backed, for the first time (Rec. p. 55). The train was backed up, according to the witness, before the highway patrolmen came to investigate the collision (Rec. p. 55).

Mr. Joe H. Seales, upon being called as a witness for plaintiff, testified that he was a resident of Jefferson County, Alabama, and was employed as department Manager for Union Supply Company (Rec. p. 58); that on the morning of the collision he was approaching the crossing and was approximately two hundred feet from the crossing when the collision occurred (Rec. p. 59). This witness testified that he did not see the automobile prior to the collision but did see the collision and that the automobile was almost across the track when the train struck the automobile near the back, the left side of the train hitting the extreme rear of the automobile. The witness testified that he had very little opportunity to observe the train prior to the collision but did observe it during the last thirty or forty feet of travel before the impact, during which time the train did not at any time slacken or reduce its speed (Rec. p. 60). According to the testimony of this witness the weather was misty and rainy and somewhat foggy at the time of the collision (Rec. p. 61).

In answer to interrogatories propounded by appellee to the appellant, appellant admitted, among other things, that about 9:33 a. m. (8:22 Central Standard Time) the train operated by the appellant reached the point where the Midfield-Fairfield Highway crossed the appellant's tracks, that being the point where the collision occurred (Rec. p. 67); that the train was a scheduled train (Rec. p. 69),

traveling away from Birmingham at the time of the collision, and that the distance from the regular station in Birmingham to the point where the collision occurred is approximately five miles; that the train was running in the direction of Bessemer (Rec. p. 69). According to appellant's answers to appellee's interrogatories the train involved in the collision was scheduled to depart from the Birmingham station at 9:00 a. m. and actually departed about 9:10 a. m. (8:00 a. m. and 8:10 a. m., respectively, Central Standard Time) (Rec. p. 70). The collision occurred at 9:22 a. m. (8:22 Central Standard Time) according to appellant's answers (Rec. p. 71).

Appellant's answer to appellee's interrogatories further state that the highway is about twenty-one feet wide at the point where the collision occurred and that the point of the collision was on the right side of the highway facing in the direction in which the automobile was traveling and to the left of the center line of the railroad tracks facing in the direction in which the train was traveling and that the automobile approached the crossing on the engineer's side of the train, the engineer's side being on the right side as one sits in the locomotive facing the front of the locomotive (Rec. p. 72). According to further answers of appellant to appellee's interrogatories, the engineer operating the locomotive at the time of the collision saw the automobile before the automobile reached the crossing when the automobile was about seventy-five to one hundred feet from the point where the railroad track and the highway cross each other, at which time the pilot of the locomotive was about seventy-five feet from the boundary of the crossing nearest the locomotive and approximately eighty-six feet from the center of the crossing (Rec. p. 73). No other employee of the defendant saw the automobile prior to the collision (Rec. p. 74). According to the appellant's answers, the locomotive and train

was traveling between forty-five and fifty miles per hour prior to the collision and did not decrease its speed before colliding with the automobile occupied by deceased (Rec. p. 76); the automobile was demolished and came to rest approximately seventy-five feet from the center of the crossing and between ten and twelve feet from the center of the appellant's railroad tracks (Rec. p. 78); the engineer continued to observe the automobile from a point when the automobile was seventy-five to one hundred feet from the crossing until immediately prior to the collision, during which time, according to appellant's answers to appellee's interrogatories, the automobile continued traveling at a rate of approximately forty miles per hour without reducing its speed between the time when the engineer first saw it and when he last saw it prior to the collision (Rec. pp. 76, 82, 87). The engineer, according to appellant's answers, had a full view of the crossing for at least a quarter of a mile before entering the crossing (Rec. p. 83). According to appellant's answers to appellee's interrogatories, the locomotive first came to a full stop a little more than four hundred feet from the center of the crossing (Rec. p. 77), and prior to the collision the engineer rang the bell and sounded the whistle of the locomotive when the front of the engine was about twelve hundred forty feet from the crossing until the engine was passing the crossing (Rec. p. 86).

In answer to interrogatories numbered 36 (a) and (b) the appellant stated:

> "The engineer did not notice the facial expression of the driver, as the train was traveling between 45 and 50 miles an hour, and the automobile was traveling about 40 miles an hour. The engineer saw the driver continue to drive at about the same rate of speed from the time the engineer first observed the driver until the engineer last observed the driver" (Rec. p. 87).

And in answer to appellee's interrogatory numbered 36 (c), which was as follows:

> "State each and everything done by the engineer operating your locomotive for a distance of one-fourth of a mile before reaching the point where said collision occurred,"

appellant stated:

> "When the front of the engine was about 1,240 feet from the crossing the engineer put the automatic bell into operation and at the same time commenced sounding the regular crossing whistle which consists of two longs, a short, and a long. The engineer continued to sound the whistle and ring the bell from that point—about 1,240 feet from the crossing—until the engine was passing the crossing" (Rec. p. 88).

J. A. Neal, called as a witness on behalf of appellant, testified that he arrived at the scene after the collision had occurred and did not see the collision but heard the train whistle start blowing as he was crossing the A. G. S. railroad tracks located about two blocks from the appellant's tracks and separated by a hill situated in between the two tracks (Rec. p. 91). He testified that he heard four long blasts and two short ones and then heard two short blasts of the whistle after the regular crossing blast and that when he arrived at the top of the hill the train had already passed the crossing and had stopped before he arrived at the railroad tracks. He stated that he did not see the train stop and did not know how far down the track from the crossing the train traveled before coming to a stop (Rec. pp. 92, 93).

Walter Johnson, upon being called as a witness by the appellant, testified that he was brakeman on the appellant's train at the time of the collision and had been employed by the appellant for twenty-nine years. He testi-

fied on behalf of the appellant that he was familiar with the Midfield crossing (Rec. p. 95) and that at the time of the collision the appellant's locomotive and railroad train was going out of Birmingham and that the weather was slightly foggy and cloudy; that he was in the front part of the second car from the engine and heard the whistle prior to the collision sound the regular crossing signal (Rec. p. 96) before the train reached the Midfield crossing. He testified that he then heard the whistle blow the emergency signal, warning that something was wrong with the train and that the train went into emergency and that the next thing he knew he heard the fragments of the car on the side of the train (Rec. p. 97). According to this witness the emergency brakes were not applied until "just about the time the warning signal was going on the brakes went on" (Rec. p. 98). According to this witness' testimony on cross-examination, when the emergency brake is applied on a train the train will immediately, and without any hesitation, begin to slacken its speed. The witness testified that in his opinion the train was traveling between thirty-five and forty miles per hour (Rec. p. 100); that the train, after the accident, was backed up toward the highway and before being backed the rear of the train was three hundred to four hundred feet from the crossing and was right on the switch or by the switch; that the engine was uncoupled from the train (Rec. p. 102) and was five hundred or six hundred feet ahead of the train (Rec. p. 103). Appellant's witness, Walter Johnson, further testified that the engine was recoupled to the cars and the train was backed up somewhere between six and eight minutes, maybe ten minutes after the collision and the train remained at the scene approximately fifty minutes before departing (Rec. p. 103). He further stated that upon a disconnection or upon the cars becoming uncoupled from the engine, the emergency brakes upon the locomotive and the cars will automatically be applied in emergency position (Rec. p. 102).

Appellant offered into evidence four photographs depicting the crossing at the time of the collision (Rec. p. 105).

Appellant called as a witness C. D. Turner, an employee of the State of Alabama Highway Department, who testified that he received notice by radio at 8:35 a. m. that the collision had occurred at 8:31 a. m. (Rec. p. 114); that he thereupon went to the scene of the accident and upon arriving there he made measurements, in the course of his investigation, of the relative positions of the physical objects which he found at the scene upon his arrival. The witness testified that according to his measurements the train traveled three hundred feet after the impact with the automobile and the top of the car was knocked two hundred four feet and the car was knocked ninety feet (Rec. p. 110). These measurements were made by the witness from the positions of the objects after he arrived at the scene and were made with a tape measure (Rec. p. 111).

J. B. Renfroe, called on behalf of the appellant, testified that he was conductor on the train involved in the collision (Rec. p. 117); that he recalled the collision in question and was in the third car from the engine at the time thereof and heard the train whistle sound the regular crossing blow, which is two longs, a short and a long, prior to the collision and then the whistle stopped blowing the regular crossing blow, and before the last long blow was finished started making some short blasts; that the train went into emergency at the time the short blasts started and he jumped up and ran out on the baggage car as soon as he could to see what was wrong and saw the automobile (Rec. p. 116). He testified that the train was ten minutes late (Rec. p. 118); that he later observed the injury to the locomotive and that the left sill step on the side of the pilot and at the rear was bent (Rec. p. 120); that the step and the lever on the back of the tank was also

injured (Rec. p. 122). The witness testified that he did not hear any bell ring prior to the collision (Rec. p. 123). According to the witness the engine became uncoupled from the cars and came to a stop approximately fifty feet beyond the cars, the front of the engine being around six hundred feet from the crossing at the time and the rear of the last car being around 300 feet from the crossing when it came to a stop. The witness testified that the train remained at the scene approximately fifty minutes; that during that time the engineer did recouple the engine to the cars but he denied that the cars were backed up in the direction of the crossing (Rec. p. 125).

H. D. Rabon, flagman on the train involved in the collision in question, testified on behalf of appellant that he was in the second car from the engine taking care of his reports at the time of the collision (Rec. pp. 126-127). He testified that he heard the regular crossing whistle, followed immediately by a short sound of the whistle; that about that time the train went into emergency and he heard something hit (Rec. p. 127). He further testified that he heard the bell ring before the train reached the crossing (Rec. p. 128). That immediately upon the train going into emergency he felt a jolt or a jar indicating a collision (Rec. p. 130). The witness admitted that he did not tell the Trainmaster, when being questioned by him on the 14th day of January, the day of the accident, that the bell was ringing (Rec. p. 130). According to the witness the train was traveling at a rate of speed between forty and forty-five miles per hour and it was a cloudy day and drizzling rain at the time of the collision (Rec. p. 132).

Walter Hugh O'Neal testified that he was the engineer on the train involved in the collision in question (Rec. p. 133); that on the morning when the collision occurred it was misty and rainy and there were clouds; that on a

clear day he would have a view of the crossing for about a mile before reaching the crossing, but at the time in question he had a plain view of the crossing for a quarter of a mile or more; that upon approaching the crossing he was looking straight ahead down the track for a distance of one-half mile before reaching the crossing and continued to travel at a rate of speed between forty-five and fifty miles an hour (Rec. p. 134) as he approached the crossing (Rec. p. 135). The witness testified that the bell was ringing automatically prior to the collision and that the whistle was blowing (Rec. pp. 136, 137). The engineer further testified that as he approached the crossing he observed the automobile occupied by the deceased between fifty and seventy-five feet from the crossing, approaching the crossing from his right and traveling at a rate of speed near forty miles an hour without either increasing or decreasing its speed as it drove on toward the crossing (Rec. pp. 137, 138). According to the testimony of the engineer the train was between seventy-five and one hundred feet from the crossing, traveling between forty-five and fifty miles per hour, when he first observed the automobile (Rec. p. 138). The engineer further testified that upon noticing the automobile continue to proceed toward the crossing without decreasing its speed he had his hand on the whistle cord, blowing the last blast of the whistle, and, from all indications, the driver of the automobile did not hear it and he began sounding the alarm blast, which is a succession of short blasts, and continued pulling the whistle with left hand and reached over with his right hand and applied the emergency brakes. He testified that all that was necessary for him to do to throw the train into emergency was to move the brake valve around to emergency position. The brake valve being a lever that is located on top of the automatic brake valve and to put it into emergency it is only necessary to pull it to the emergency position, according to this witness' testimony (Rec. pp. 139, 140). The engineer testified that the train came

uncoupled as the result of the collision and that he backed up the engine to the train and coupled it (Rec. p. 141); that the rear of the train was between three and four hundred feet from the crossing when it came to a full stop after the collision (Rec. p. 142). According to the testimony of the engineer the uncoupling of the train would automatically throw the train into emergency (Rec. p. 153). The engineer testified that he continued working steam as he approached the crossing until the moment of the collision and that working steam would help maintain the speed of the train (Rec. pp. 153, 154). The engineer testified that an inspection of the locomotive after the collision disclosed that the back tank step was bent and the lift lever which lifts the pin to uncouple the engine tank from the coaches was bent (Rec. p. 150). He also testified that he had been operating trains over the Midfield-Fairfield Highway crossing since 1928 (Rec. p. 145).

R. O. Watts testified on behalf of appellant that the whistle post for the Midfield-Fairfield Highway crossing in the direction from which the train approached the crossing is located by measurement one thousand three hundred thirty-four feet and five inches from the crossing (Rec. p. 156).

J. L. Hufham, an employee of the appellant, testified that he was mechanical examiner for the appellant (Rec. pp. 157, 158) and that the human reaction time for the application of the emergency brake on a locomotive is variable; that it takes some people longer to apply the emergency brakes by pulling the emergency brake lever than it does others, but that he used two seconds in his formula for arriving at distance which would be required to stop a locomotive under various conditions (Rec. p. 162). Hufham testified that the mechanical reaction that is required for the brakes to be applied completely throughout the train from the time the engineer pulls the

emergency brake lever into emergency position would be about two seconds on a three-coach passenger train traveling at a rate of forty-five miles an hour on a level, or practically level track, just slightly upgrade, drawn by a 1600 class locomotive (Rec. pp. 163, 164, 165). The witness Hufham further testified that in his opinion after the brakes were applied, a train consisting of a 1600 class locomotive and three coaches, traveling at a rate of forty-five miles per hour, would travel five hundred eighty-one feet before coming to a full and complete stop (Rec. p. 161).

Certain photographs of the scene of the accident were also introduced as exhibits and were certified to the Court of Appeals separately from the printed record. The Court of Appeals has incorrectly recited the facts established by these photographs.

POINTS OF LAW.

I.

Where lower Federal Courts are applying local laws, the Supreme Court will not set aside their ruling, except on a plain showing of error.

Palmer v. Hoffman, 63 Sup. Ct. Rep. 477, 318 U. S. 109, 87 L. Ed. 645.

II.

Supreme Court does not grant certiorari to Court of Appeals to review evidence and to discuss specific facts.

U. S. v. Johnson, 45 Sup. Ct. 496, 268 U. S. 220.

III.

In dealing with issues of state law that enter into judgments of Federal Courts, the Supreme Court is hesitant to overrule decision by Circuit Court of Appeals on the law of particular states, unless their conclusions are shown to be unreasonable.

Graver Tank & Mfg. Co. v. Linde Air Products Co., 69 Sup. Ct. 535, 538, 336 U. S. 271;

Propper v. Clark, 69 Sup. Ct. 1333, 1341, 1342, 337 U. S. 472;

Anderson v. Abbott, 64 Sup. Ct. 531, 535, 321 U. S. 349;

Brewer Oil Co. v. United States, 43 Sup. Ct. 60, 63, 260 U. S. 77, 86;

Alabama Power Co. v. Ickes, 58 Sup. Ct. 300, 302 U. S. 464;

Baker v. Schofield, 37 Sup. Ct. 333, 333, 244 U. S. 144.

"The opinion of the Court of Appeals and the trial court being rendered by judges who are constantly

required to pass upon Alabama law questions will not be disturbed unless the Supreme Court can say with certainty that they are incorrect."

Spiegel's Estate v. C. I. R., 69 Sup. Ct. 301, 304, 335 U. S. 701.

IV.

Counts of a complaint charging simple negligence authorize a recovery on evidence of subsequent negligence after discovery of peril.

Miles v. Hines, 205 Ala. 83, 87 So. 837;
Central of Ga. R. R. Co. v. Foshee, 125 Ala. 199;
Brown & Flowers v. Central of Ga. R. R. Co., 197 Ala. 71, 72 So. 366.

V.

The negligence of the driver of an automobile is not imputable to passengers.

Frierson v. Gulf, Mobile & Ohio R. R. Co., 48 So. (2d) 170.

VI.

In the trial of a cause any material facts admitted by counsel may be the ground of the Court's procedure equally as if established by the clearest proof.

France Manufacturing Co. v. Jefferson Electric Co., 106 Fed. (2d) 605, Cert. Den. 60 Sup. Ct. 471, 309 U. S. 657, 84 L. Ed. 1006, Rehearing denied 60 Sup. Ct. 589, 309 U. S. 696, 84 L. Ed. 1036;
Fontes v. Porter, 156 Fed. (2d) 956;
Kansas City Life Ins. Co. v. Bowns, 129 Fed. (2d) 289;
Conn v. Penn, 18 U. S. 424, 5 Wheat. 424, 5 L. Ed. 125;

General Electric Co. v. Wagner Electric Manufacturing Co., 123 Fed. 101, Affmg. 130 Fed. 772, 66 C. C. A. 82.

VII.

On defendant's appeal from judgment for plaintiff, the evidence and inferences deducible therefrom are viewed most favorably to plaintiff, and the reviewing court will not weigh the evidence, but is required to assume as established all facts that the evidence introduced upon the trial supporting plaintiff's claim, reasonably tended to prove, and inferences fairly deducible from the evidence are to be drawn in plaintiff's favor.

Maryland Casualty Co. v. Cushing, 171 Fed. (2d) 257;

Chicago Great Western Ry. Co. v. Beecher, 150 Fed. (2d) 394, Cert. Den. 66 Sup. Ct. 339, 326 U. S. 781, 90 L. Ed. 473;

Atlantic Greyhound Corp. v. Crowder, 177 Fed. (2d) 820.

VIII.

The testimony of a witness who was in a position where he would, in all probability, have heard the bell ringing, if it had been ringing, that he did not hear the bell ring is of sufficient probative value to take the issue to the jury.

Wigmore on Evidence, 3rd Ed., Vol. 11, Sec. 664, p. 778, 1947 Pocket Supp. to Vol. 11, p. 119;

Union Pacific Ry. Co. v. Burnham, 124 Fed. (2d) 500;

Louisville & Nashville R. Co. v. York, 128 Ala. 305, 30 So. 676 (12);

Nashville, C. & L. Ry. v. Prince, 103 So. 463, 212 Ala. 499;

Grand Trunk Western Ry. Co. v. Heatlie, 48 Fed. (2d) 759;

Chicago & N. W. Ry. Co. v. Golay, 10th C. C. A., 155 Fed. (2d) 842.

IX.

It is a breach of duty for an engineer to operate a locomotive and train of cars over a public crossing at a high rate of speed if he knows that the use of the crossing by the public is so frequent and constant as that people or property are likely, probably, in an exposed position at or about the crossing; and where there was evidence that such public crossing was used with great frequency by the general public, and that the engineer had been operating trains over such crossing for approximately twenty-three years, and evidence showed that the approach to the crossing was obscured to the engineer's view, evidence that locomotive and train of cars were traveling forty-five to fifty miles per hour was sufficient to make a jury question of whether the defendant was guilty of negligence or wantonness in approaching the crossing at a high and dangerous rate of speed.

Atlantic Coast Line R. Co. v. Brackin, 28 So. (2d) 193;
Pollard v. Stewart, 168 So. 203, 27 Ala. App. 116, Cert. Den. 168 So. 205, 232 Ala. 453;
Alabama Great Southern v. Moundville Motor Co., 4 So. (2d) 305, 241 Ala. 633;
Miles v. Hines, 205 Ala. 83, 87 So. 837;
Louisville & Nashville R. R. Co. v. Sullivan, 13 So. (2d) 877, 880, 244 Ala. 485;
Grauer v. Alabama Great So. R. Co., 96 So. 915, 209 Ala. 568;
44 Am. Juris. 753, p. 512;
44 Am. Juris. 747, p. 507;
Mobile J. & K. C. R. Co. v. Smith, 153 Ala. 127, 45 So. 57, 127 Am. St. Rep. 22;
Highland Ave. Belt R. Co. v. Robbins, 124 Ala. 113 27 So. 422, 82 Am. St. Rep. 152.

X.

The evidence presented a question properly for the jury as to the negligence of the engineer after the discovery of intestate's peril as being the proximate cause of the collision and the resulting death of appellee's intestate.

Alabama Great Southern R. R. Co. v. Bolton, 7 So. (2d) 296, 242 Ala. 562;
Alabama Great Southern R. R. Co. v. Moundville Motor Co., 4 So. (2d) 305, 241 Ala. 633;
Southern Ry. Co. v. Sherrill, 167 So. 731, 232 Ala. 184;
Louisville & Nashville R. R. Co. v. Calvert, as Admr., 172 Ala. 597, 55 So. 812;
Thompson & Donahoo v. Mobile & O. R. Co., 211 Ala. 646, 101 So. 441;
Southern Ry. Co. v. Williams, 243 Ala. 429, 10 So. (2d) 273;
Louisville & Nashville Ry. Co. v. Sullivan, 13 So. (2d) 877, 244 Ala. 485;
Central of Ga. Ry. v. Ellison, 199 Ala. 571, 75 So. 159;
Southern Ry. Co. v. Shelton, 136 Ala. 191, 34 So. 194;
Williams v. Roche Undertaking Co., 49 So. (2) 902;
Louisville & Nashville Ry. Co. v. Lloyd, 186 Ala. 119, 6 So. 153;
Miles v. Hines, 205 Ala. 83, 87 So. 837;
Southern Ry. Co. v. Dear, 26 Ala. App. 508, 162 So. 685;
Pollard v. Nicholls, 99 Fed. (2d) 955, 65 So. 153;
Randle v. Birmingham Ry., Light & Power Co., 185 Ala. 532, 48 So. 114.

XI.

Wantonness may arise from knowledge that persons, though not seen, are likely to be in a position of danger and with conscious disregard of known conditions of

danger and may arise after discovery of actual peril by a conscious failure to use preventive means at hand.

Wilhite v. Webb (Ala.), 46 So. (2d) 414;
Louisville & Nashville R. R. Co. v. Sullivan, 13 So. (2d) 877, 244 Ala. 485;
Southern Ry. Co. v. Shelton, 136 Ala. 191, 34 So. 194;
Miles v. Hines, 205 Ala. 83, 87 So. 837.

XII.

Where the engineer admitted knowledge of the perilous situation and testified to making due effort to stop the train, the failure of the engineer to check its speed before the collision and the distance the train ran after the event, together with the other facts and circumstances in evidence, were sufficient to warrant the inference by a fair jury that the engineer did not use reasonable care to avoid the collision after discovering the peril where the difference of a fraction of a second would have enabled appellee's intestate to arrive at a place of safety.

Pollard v. Nicholls, 99 Fed. (2d) 955;
Chesapeake & O. R. Co. v. Meyer, 150 Va. 656, 143 S. E. 478;
Chicago, M. & S. P. R. Co. v. Winstanley, 73 Wisconsin 375, 39 N. W. 856;
Central of Ga. R. Co. v. Forshee, 125 Ala. 199, 217, 27 So. 1006, 1013.

XIII.

Where a complaint contains several counts or causes of action and a general motion for a directed verdict is made by defendant, the only question raised is whether there was sufficient evidence to support the jury's verdict on any of the charges, counts, or causes of action contained in the complaint.

Palmer v. Hoffman, 63 S. Ct. 477, 318 U. S. 100;
Kinser v. Riss & Co., 177 Fed. (2d) 316, 317;

Miller v. Advanced Transportation Co., 126 Fed. (2d) 442;

Washington Asphalt Block & Tile Co. v. Mackey, 15 App. D. C. 410;

Starr Jobbing House v. May Hosiery Mills, 93 So. 572, 207 Ala. 620;

Cross v. Ryan, 124 Fed. (2d) 883, 887;

Larson v. Chicago & N. W. Ry. Co., 171 Fed. (2d) 841, 64 C. J. 1081;

Greyhound Lines v. Callahan, 13 So. (2d) 660, 244 Ala. 449;

Bessemer Liquor Co. v. Tillman, 139 Ala. 462, 36 So. 40.

XIV.

The duty of the engineer arose immediately on the discovery of the peril of plaintiff's intestate.

Louisville & N. R. Co. v. Calvert, 172 Ala. 597, 55 So. 812;

Thompson v. Mobile & O. R. Co., 211 Ala. 646, 647, 101 So. 441;

Louisville & N. R. Co. v. Young, 153 Ala. 232, 236, 45 So. 238, 239, 16 L. R. A. (N. S.) 301;

Mobile L. & R. Co. v. Logan, 213 Ala. 672, 674, 106 So. 147, 149;

Johnson v. Louisville & N. R. Co., 227 Ala. 103, 110, 148 So. 822, 828.

XV.

Failure to give quick loud blast of whistle is sufficient to take case to jury.

Snider v. Ala. G. S. R. Co., 210 Ala. 119, 122, 97 So. 209, 210;

Mobile L. & N. R. Co. v. Gadik, 211 Ala. 582, 584, 100 So. 837;

Manley v. B. R. L. & P. Co., 191 Ala. 531, 534, 68 So. 60;

Louisville & N. R. Co. v. Rush, 22 Ala. App. 195, 114 So. 21, 22.

XVI.

Failure to decrease speed fraction of a second may constitute subsequent negligence.

Louisville & N. R. Co. v. Scott, 23 Ala. App. 132, 122 So. 184, 185;

Central of Ga. Ry. Co. v. Foshee, 125 Ala. 199, 221, 27 So. 1006;

Louisville & N. R. Co. v. Robinson, 141 Ala. 325, 331, 37 So. 431, 432;

Seaboard Air Line R. Co. v. Laney, 199 Ala. 654, 657, 75 So. 15;

Randle v. B. R. L. & P. Co., 158 Ala. 532, 535, 48 So. 114;

Sands v. Louisville & N. R. Co., 156 Ala. 323, 326, 47 So. 323;

So. & No. Ala. R. Co. v. Sullivan, 59 Ala. 282.

XVII.

Although engineer may have kept proper lookout and given proper signals, yet the jury might reasonably infer that he made no effort to reduce speed of train.

Central of Ga. R. Co. v. Bates, 225 Ala. 519, 521, 144 So. 9, 11;

Southern R. Co. v. Dear, 26 Ala. App. 508, 162 So. 685.

XVIII.

Damages under Homicide Act are purely punitive, whether the conduct causing liability is simple or subse-

quent negligence or wanton, willful, or intentional conduct, and is matter for the jury.

Richmond & D. R. Co. v. Freeman, 97 Ala. 289, 292, 11 So. 800;

Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 309, 13 So. 57;

Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 51, 9 So. 303, 30 Am. St. Rep. 28;

Alabama Power Co. v. Goodwin, 210 Ala. 657, 658, 99 So. 158;

Birmingham R. L. & P. Co. v. Rutledge, 142 Ala. 195, 204, 39 So. 338;

Ala. G. S. R. Co. v. Sellers, 93 Ala. 9, 15, 9 So. 375, 30 Am. St. Rep. 17.

ARGUMENT.

A.

Petitioner invokes the discretionary power of the Supreme Court to issue writ of certiorari pursuant to provisions of Section 1254 (1) of Title 28, United States Code, pursuant to Rule 38, Para. 5, second clause of subdivision (b), reading as follows:

> "Where a Circuit Court of Appeals has . . . decided an important question of local law in a way probably in conflict with applicable local decisions."

The decision of the Court of Appeals sought to be reviewed decided that:

> "As there is credible evidence to support a finding of negligence on the part of the defendant, the trial court was correct in submitting the matter to the jury and in denying the motion for new trial. Miller v. Union Pac. R. Co., 290 U. S. 227, 54 S. Ct. 172, 78 L. Ed. 285; Alabama Great Southern R. Co. v. Moundville Motor Co., 241 Ala. 633, 4 So. 2d 305; Alabama Great Southern R. Co. v. Bolton, 242 Ala. 562, 7 So. 2d 296; Southern Ry. Co. v. Sherrill, 232 Ala. 184, 167 So. 731; Atlantic Coast Line v. Brackin, 248 Ala. 459, 28 So. 2d 193; Central of Ga. Ry. Co. v. Ellison, 199 Ala. 571, 75 So. 159; Pollard v. Nicholls, 5 Cir., 99 F. 2d 955."

It thus appears that the only ruling of the Court of Appeals is a ruling upon the sufficiency of the evidence to go to the jury, and in support of that ruling the Court of Appeals made a summary of the matters appropriate to be considered by the jury in the following language:

> "It was also the duty of the railroad company to exercise reasonable care for the safety of travelers on

the highway, and to have its train under control appropriate to the circumstances involved. Weatherly v. Nashville C. & St. L. Ry., 166 Ala. 575, 51 So. 959; Atlantic Coast L. v. Jackson, 221 Ala. 646, 130 So. 388; Davis v. Smitherman, 209 Ala. 244, 96 So. 208. In determining whether or not the railroad company performed that duty, it is appropriate to consider, amongst other things, the character and location of the crossing; the extent of its use by the public; the speed of the train; the distance traveled by the train before stopping after discovering plaintiff's peril; whether or not a crossing signal was given in compliance with Ala. Code, 1940, Title 48, Sec. 170; the nature and extent of the obstructions to the view of a traveler on the highway, and to the engineer of the train, approaching the crossing in the manner here involved; the extent to which existing weather conditions may have reduced visibility or affected the slowing of the train upon discovery of deceased's position of peril; the alertness of the engineer in discovering deceased's peril and in stopping the train; the condition of traffic on the highway; the fact that of other persons in the vicinity some heard the signals but some did not; and that another traveler heard them and safely stopped his car. These and other matters which might be appropriately considered upon the question of the railroad's negligence vel non, are typical matters for jury appraisal. The engineer testified that he did not discover the deceased's peril in time to avoid the fatal collision. But the jury might have inferred from the circumstances that he did or that he would have discovered it had he exercised due care. Action of the engineer a split second sooner would have averted the collision. Louisville & Nashville Ry. Co. v. Sullivan, 244 Ala. 485, 13 So. 2d 877, 880; Central of Ga. Ry. Co. v. Motherwell, 227 Ala. 300, 149 So. 820; Southern Ry. Co. v. Dear, 26 Ala. App. 508, 162 So. 685.

> "It cannot be said as a matter of law that the negligence of the driver of the car was the sole proximate cause of the collision, nor that the defendant was free from negligence. The evidence on these questions is conflicting. Reasonable minds might differ thereon. There is sufficient evidence, if believed, to support the jury's finding that the defendant was guilty of negligence."

It will be noted that the record shows that defendant, by acquiescence, admitted the crossing in question to be "a populous crossing" (Rec. p. 45); that according to the undisputed evidence plaintiff's deceased intestate was a passenger in the automobile involved, and by the undisputed evidence not chargeable with any contributory negligence. There was evidence bearing upon each matter which the Court of Appeals in Paragraphs (3, 4) of its opinion said were matters proper to be considered in determining whether or not the railroad performed its duty of due care.

The petitioner has failed to show this court any applicable decision of the Supreme Court of Alabama contrary to any holding of law set out in the opinion of the Court of Appeals here sought to be reviewed.

Petitioner seeks to lean upon the opinion of the Supreme Court of Alabama in the case of A. C. L. R. Co. v. Barganier, rendered January 3, 1952 (more than a year after the trial in District Court, and nearly a month after the opinion of the Court of Appeals was rendered), to support his argument that the trial court and the Court of Appeals decided "an important question of local law in a way probably in conflict with applicable local decisions." Surely the District Court nor the Court of Appeals could not be held to possess powers of clairvoyance and be able to follow a decision of the local courts rendered long after their decisions were rendered.

However, there is no conflict in the Barganier decision and the decision of the Court of Appeals on any question of local law. Petitioner consumes twenty-two and one-half pages of a forty-five page brief printing the views of Justice Brown as the opinion of the court, when the per curiam opinion of the entire court, with the exception of Justice Brown, refused to concur in Judge Brown's opinion in many features and limited the reversal of the case to the holding that due to the contributory negligence of the plaintiff, the court should have given the affirmative charge on the negligence count, thereby indirectly holding that there was sufficient evidence of the defendant's negligence to go to the jury, but that plaintiff could not recover for the reason that under Alabama law any contributory negligence on the part of the plaintiff proximately contributing to his injury defeats his recovery. As to the wanton count the per curiam opinion limited its reversal of the court below on that count solely to the question of joining the master and servant involved, viz., the count sounded in trespass and, under the ruling in Sibley v. Sibley, in manuscript at that time, the railroad company and its employee engineer could not be joined in a wanton count, notwithstanding the Act of October 9, 1947 (Sec. 138-1, Title 7, Code of 1940, Pocket Part). The Barganier opinion is now on rehearing and is not a final opinion of the Supreme Court of Alabama at the present time. Our case is differentiated from the Barganier case, supra, in the following particulars:

(a) Our plaintiff's deceased intestate was a passenger and under the undisputed evidence could not be guilty of contributory negligence.

(b) Our complaint did not join the engineer and the company and was not subject to the criticism that the master and servant were both joined in the wanton count contrary to the decisions of the Supreme Court of Alabama in City Delivery v. Henry, 139 Ala. 161, 34 So. 389, and

other cases cited by the Supreme Court of Alabama in the case of Sibley v. Sibley, Sixth Division, 158, manuscript.

(c) It was admitted in our case that the crossing was a populous crossing (Rec. p. 45).

So, even if the Barganier case were determined on rehearing in the Supreme Court of Alabama and had been rendered prior to the trial of this case in the District Court, it does not clearly appear that the holding of the Court of Appeals is contrary to the Barganier per curiam opinion (Petitioner's brief, pp. 43-44).

So, the petitioner cannot look to the Barganier case for support in his effort to invoke a discretionary power of the Supreme Court to issue its writ of certiorari on the ground that the Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."

Petitioner cites no other Alabama case which he claims to be in conflict with the ruling of the Court of Appeals that the trial court correctly submitted this case to the jury and correctly overruled the motion for new trial.

B.

We have cited authorities in our Points of Law to the effect that the Supreme Court will not set aside the ruling of a lower Federal Court in applying local laws, except on a plain showing of error (Point I), and that the Supreme Court does not grant writ of certiorari to Court of Appeals to review evidence and to discuss specific facts (Point II), and that the Supreme Court of the United States is particularly hesitant in overruling a decision by the Court of Appeals on the law of particular states, unless their conclusions are shown to be unreasonable when such opinions are rendered by judges who are constantly required to pass upon the law of the state involved, and who have had

long experience in the practice of the law in the state whose local law is involved (Point III).

C.

In support of the ruling of the Court of Appeals that the trial court was correct in submitting the matter to the jury and in denying the motion for new trial, we direct the attention of the Supreme Court of the United States to the many different authorities cited by the Court of Appeals at the conclusion of its opinion, and particularly to those authorities which we have cited in support of our Points IV to XVII, inclusive.

This action was brought by the appellee as administratrix of the estate of Murphy Hill Freeman, deceased, under what is generally termed the Alabama Wrongful Death Statute, Title 7, Sec. 123, Alabama Code of 1940. The collision in question occurred at a point where appellant's tracks, between Birmingham and Bessemer, cross a populous and frequently traveled highway known as the Midfield-Fairfield Highway. There was an abundance of evidence introduced upon the trial to show that this particular crossing was surrounded by populous communities and was used with great frequency at all times by the general public and was what is termed in many of our cases as a "populous crossing" (Rec. pp. 24, 25, 26, 33, 42, 43, 44, 45). The character of the crossing as a populous and dangerous crossing was not made an issue by the appellant upon the trial of this cause and the appellant conceded that it was a populous and dangerous crossing used with great frequency by the general public and had been so used for a long time prior to the date of the collision (Rec. p. 45). The trial judge so ruled that the evidence was sufficient in this respect and called upon the appellant to state whether or not the appellant was going to make any issue in this regard and the appellant sat

silently by and acquiesced in the ruling of the trial court in this connection. It has been held many times, and is a recognized principle in federal practice, that in the trial of a cause any facts admitted by counsel may be the grounds of the court procedure equally as if established by clearest proof. **France Manufacturing Co. v. Jefferson Electric Co.**, 106 Fed. (2d) 605, Cert. Den. 60 Sup. Ct. 471, 309 U. S. 657, 84 L. Ed. 1006, Rehearing Denied 60 Sup. Ct. 589, 309 U. S. 696, 84 L. Ed. 1036; Fontes v. Porter, 156 Fed. (2d) 956; Kansas City Life Ins. Co. v. Bowns, 129 Fed. (2d) 287; Conn v. Penn, 18 U. S. 424, 5 Wheat. 424, 5 L. Ed. 125; General Electric Co. v. Wagner Electric Manufacturing Co., 123 Fed. 101, Affmg. 130 Fed. 772, 66 C. C. A. 82. And appellant did, by its silence and acquiescence, waive any right to question the ruling of the court in this connection. The court acted upon appellant's conduct and made it the basis of the court's procedure and denied appellee the right to offer any more evidence in that connection. Appellee cannot understand the appellant taking a contrary position on this appeal. It only serves to demonstrate the weakness of appellant's case. This crossing was located just outside of the corporate limits of the City of Birmingham and was between Birmingham and Bessemer and was surrounded by populous communities. This Court will take judicial notice that the population of Jefferson County is 555,000; that the population of Birmingham is 324,074; that the population of Bessemer is 28,471; that the population of Fairfield is 13,219. The engineer admitted on the trial of this cause that he had been operating locomotives continuously over this crossing since 1928, either as fireman or engineer. It has been held many times that such evidence is sufficient to afford an inference of familiarity by the engineer with the crossing; **Gulf Mobile & O. R. Co. v. Sanders**, 51 So. (2d) 531, 532; and that the engineer had knowledge that this crossing was a public crossing that was used with

great frequency by the general public. **Atlantic Coast Line R. R. Co. v. Brackin,** 28 So. (2d) 193. Common sense and everyday understanding will dictate that it is reasonable to infer that a person cannot operate a locomotive over a crossing for twenty-three years without being familiar with the crossing and without knowing its character. The engineer did not deny that he was familiar with the crossing. He testified that as he approached the crossing the train was traveling at a rate of speed between forty-five and fifty miles an hour (Rec. p. 138), and that the speed of the train was not decreased at any time prior to the collision (Rec. pp. 134, 135), but continued working steam to maintain the speed of the train (Rec. pp. 153, 154). Appellant admitted in its answers to appellee's interrogatories that the train was ten minutes behind schedule (Rec. p. 70). There was other evidence which justified the inference that the train was traveling much faster. According to appellant's witness, an employee of the appellant, J. L. Huffman, the train in question, under the condition existing, traveling at forty-five miles per hour, could be stopped in five hundred eighty-one feet (Rec. p. 161). The lever which lifts the pin to uncouple the engine from the first car was bent after the collision (Rec. p. 150). The engine was uncoupled from the coaches and the rear of the train was three hundred to four hundred feet from the crossing when it came to a full stop, and the engine was five hundred or six hundred feet ahead of the train (Rec. p. 103). This was according to appellant's witness, the fireman on the train. According to the testimony of the engineer, the locomotive on the train was sixty-five feet in length and the cars were each seventy feet in length (Rec. pp. 146, 142).

The evidence of J. L. Huffman with reference to his opinion that it would require on an average of two seconds human reaction time and two seconds mechanical reaction time, a total of four seconds on the average, between the

time the engineer commences to apply the brakes and the time they take effect in emergency was merely his opinion as to the average time required in the operations involved and had no binding effect on the jury, he himself stating that it was a variable factor (Rec. p. 162). The jury could use their common experience in determining the time and distance required to slow down or stop the train. Fayet v. St. Louis & S. F. R., 81 So. 671, 203 Ala. 3. The undisputed evidence of all of the witnesses is that the automobile had practically cleared the crossing at the time of the collision and that the locomotive struck the extreme rear of the automobile and demolished it and that it would have taken the automobile only an infinitesimal fraction of a second to have gone beyond the point of danger.

The evidence in this case authorized the jury to find that the locomotive traveled a maximum of 1275 feet past the crossing involved (Rec. pp. 103-146), and since the defendant's own witness testified that the train could be stopped at forty-five to fifty miles in a train of 581 feet, the jury might have inferred much greater speed since the required distance for stopping was not less than 1075 feet, and not more than 1275 feet under the evidence (Rec. p. 103) (Rec. pp. 146-142).

In the case of **Atlantic Coast Line R. R. Co. v. Brackin**, 28 So. (2d) 193, it was affirmatively held that evidence as to a train being operated at a high and dangerous rate of speed of forty to fifty miles an hour over a public crossing that was used with great frequency by the general public warranted a submission of both negligence and wantonness to the jury where the engineer had been operating trains over the crossing for a number of years, thus affording the basis for the inference that he was familiar with the crossing, and had knowledge that the crossing was used with great frequency by the general public and that people or property were likely, probably,

in an exposed position at or about the crossing, and the Supreme Court of Alabama correctly held that the Circuit Court did not err in refusing the affirmative charges requested by the defendant, or in overruling defendant's motion for a new trial.

There was sufficient evidence of negligence on the part of the engineer, after discovery of intestate's peril, to support the verdict under either of counts One, Two or Three. Herbert Foster, a witness for the plaintiff, testified that he was following the automobile involved in the collision in which appellee's intestate was riding as a passenger. He testified that when he first saw the train the train was two hundred feet from the crossing, at which time the automobile was around fifty feet from the crossing and was traveling around fifteen to twenty miles an hour and did not increase or decrease its speed at any time before the collision (Rec. p. 30). This witness further testified that the train did not reduce its speed at any time prior to the collision from the moment he first observed the train until the moment the train struck the extreme rear of the automobile (Rec. p. 31). The undisputed evidence was that the automobile approached the crossing from the engineer's side, or the right side of the train and that the train struck the extreme rear of the automobile (Rec. p. 72). According to appellant's answers to appellee's interrogatories, the engineer operating the locomotive at the time of the collision first saw the automobile when the automobile was seventy-five to one hundred feet from the nearest railroad track (Rec. p. 73), and the locomotive was traveling between forty-five and fifty miles an hour (Rec. p. 76). Walter Johnson, appellant's fireman, testified that the train was traveling, in his opinion, thirty-five to forty miles per hour (Rec. p. 100). The engineer continued to observe the automobile, according to appellant's answers to appellee's interrogatories, from the time he first observed it until immediately

prior to the collision, during which time the automobile continued traveling at the same rate of speed which was, according to appellant's answers, approximately forty miles an hour, without reducing its speed, or increasing its speed, or giving any indication that the driver observed the train, or was aware of the approaching danger (Rec. pp. 76, 82, 87). The engineer, according to appellant's answers (Rec. p. 83) and according to his testimony at the trial, had a plain view of the crossing for a quarter of a mile or more and that, upon approaching the crossing, was looking down the track in the direction of the crossing for a distance of one-half mile before reaching the crossing and continued to travel at a rate of speed of between forty-five and fifty miles an hour (Rec. p. 34), as he approached the crossing, without ever diminishing his speed prior to the accident, but continued to work steam on the engine as he approached the crossing and until the moment of the collision which, he testified, would help maintain the speed of the train (Rec. pp. 153, 154). The only injury to the train, according to the undisputed evidence, was on the left side of the train to the rear of the front of the pilot and to the lift lever which lifts the pin which uncouples the engine tank from the coaches, which was bent (Rec. p. 150). According to the testimony of Walter Johnson, hereinabove stated, the rear of the train was three hundred to four hundred feet from the crossing, when the train came to a stop (Rec. p. 102), and the engine, which was uncoupled from the train (Rec. p. 102), was five hundred or six hundred feet ahead of the train (Rec. p. 102). The length of the cars, as above stated, according to the testimony of the engineer, was seventy feet each and the length of the engine was sixty to sixty-five feet long. Thus, there was substantial evidence that the train traveled around eleven hundred sixty feet after the collision. According to the undisputed testimony the uncoupling of the engine from the train would automatically throw the brakes on in emergency (Rec. p. 153). The testimony of

Walter Johnson was that the train was backed up somewhere between six and eight minutes, maybe ten minutes, after the collision (Rec. p. 103). The witness, Herbert Foster, testified that he did not hear the bell ringing at any time prior to the collision (Rec. p. 37).

Sylvester Penny, who was walking along in the pathway beside the tracks five feet from the train as it passed him and a short distance from the crossing, and who testified that he was paying attention to the train both before it reached him, as it passed him, and until the moment of the collision, testified that he did not hear the bell ringing at any time (Rec. pp. 48, 55). J. B. Renfroe, the conductor on the train, who was in the third car from the engine at the time of the collision, testified definitely that he did not hear any bell ring prior to the collision (Rec. p. 123).

Only the engineer and one member of the train crew testified positively that the bell was rung. One member of the crew was not asked whether the bell was rung and did not testify either affirmatively or negatively in this regard. The correct rule is that the testimony of a witness who was in a position where he would have, in all probability, heard the bell ring, if the bell had been rung, that he did not hear the bell ringing is of sufficient probative value to make a jury question of whether or not the bell was ringing. **Wigmore on Evidence**, 3rd Ed., Vol. II, Sec. 604, p. 778, 1947 Pocket Supp. to Vol. II, page 119; **Chicago & N. W. Ry. Co. v. Burnham**, 124 Fed. (2d) 842, 846; **Louisville & Nashville R. Co. v. York**, 128 Ala. 305, 30 So. 676 (1a); **Nashville C. & St. L. Ry. v. Prince**, 103 So. 463, 212 Ala. 499; **Grand Trunk Western Ry. Co. v. Heatlie**, 48 Fed. (2d) 759. Certainly, the conductor who was on the train at the time and who, according to his testimony, was attentive, would have heard the bell if the bell had been ringing, and in all probability the witness, Sylvester Penny, who was only five feet from the train as it passed him immediately prior to the collision, would

have heard the bell ringing, if it had been ringing. Sylvester Penny testified that he was familiar with the sound or racket that the emergency brakes on a train make when they are applied and that he did not hear the brakes applied at any time from the time he first saw the train under after the collision had occurred (Rec. pp. 48, 49). The engineer did not give the quick, loud emergency blast of the whistle until the train had almost reached the point of the collision, according to the testimony of Sylvester Penny (Rec. p. 50), and according to the testimony of Walter Johnson (Rec. p. 97), and according to the testimony of H. G. Rabon, the flagman on the train (Rec. p. 127). The witness, H. G. Rabon, was the only member of the crew, other than the engineer, who testified that the bell was ringing, and the witness Rabon admitted that he did not state to the trainmaster at the time of the investigation immediately after the collision, on the day of the collision, that he heard the bell ringing, but explained that his reason for not so stating was that the trainmaster did not specifically ask him that question (Rec. p. 130). There was no evidence that the engineer sanded the tracks prior to the collision; there was no evidence that the engineer reversed the engine. It was drizzling rain, foggy and cloudy.

The evidence was abundantly sufficient for the jury to infer that the engineer, after he discovered the intestate's peril, did nothing to check the speed of the train.

The Supreme Court of Alabama, in the case of **Central of Georgia Ry. Co. v. Ellison**, 199 Ala. 571, 574, 75 So. 159, quoted with approval the following from the case of **Southern Ry. Co. v. Shelton**, 136 Ala. 191 et seq., 34 So. 194:

> "The important question yet remains: Did the engineer or fireman actually see him in this perilous position? Or, rather, does the evidence we have detailed

afford the basis for an inference by the jury that one or both of them did in fact see him in such position? Both of them testified that they did not see him or anybody on the track at that time and place. But might not the jury find to the contrary notwithstanding? We think so. The jury were not bound to believe or disbelieve their statements that they did not see any one on the track. And the conclusion on the evidential tendencies under consideration would be drawn thus: Shelton was in a position of manifest peril on the track in front of the engine. He was in view of the enginemen. They were looking along the track where he was. Therefore they must have seen him, and this, though they testify they did not."

In the case of **Alabama Great Southern R. Co. v. Moundville Motor Co.**, 4 So. (2d) 305, 241 Ala. 633, the Supreme Court of Alabama observed:

"But, if the engineer, who is under duty to keep a lookout, sees the driver does not stop, look and listen, but proceeds at same speed, apparently heedless of rapidly approaching peril, it cannot be said as matter of law no duty arises to resort to available preventive measures on the part of the engineer.

"If a vigilant man, of reasonable foresight, perceives peril in the situation, a duty of instant action springs up, if any action known to skillful engineers is then available to avert disaster. A sharp warning signal may be a first, and possibly the only preventive measure available, dependent on the circumstances of the particular case. This court has frequently dealt with similar cases. The negligence of the engineer as a proximate cause of the injury is usually a jury question. So it is in this case. Thompson & Donahoo v. Mobile & O. R. Co., 211 Ala. 646, 101 So. 441; Southern R. Co. v. Sherrill, 232 Ala. 184, 167 So. 731; Johnson v. Louisville & N. R. Co., 227

Ala. 103, 148 So. 822; Central of Georgia R. Co. v. Bates, 225 Ala. 519, 144 So. 9; Alabama Great Southern R. Co. v. Sanders, 203 Ala. 57, 82 So. 17."

In the case of **Randle v. Birmingham Railway, Light & Power Co.**, 158 Ala. 532, 537, 48 So. 114, the Supreme Court of Alabama stated as follows:

> "According to the principles of law heretofore announced, it was the duty of the motorman to do all in his power, with the means at hand, to conserve the safety of the intestate, after discovering he was in peril and was unaware of the approach of the car. At what time the motorman discovered intestate's peril, or realized that he was not aware of it, and whether, after discovering the danger of a catastrophe, he exercised the proper degree of care toward averting it, must, of course, be determined from the evidence."

The engineer could not continue to indulge the assumption that the automobile would stop before reaching the tracks on which his train was approaching the crossing after the danger became imminent. **Alabama Great Southern Ry. Co. v. Bolton**, 7 So. (2d) 296, 242 Ala. 562.

In the case of **Southern Ry. Co. v. Sherrill**, 167 So. 731, 232 Ala. 184, the Supreme Court of Alabama, in affirming a judgment for the plaintiff, stated:

> "The duty of an engineer, on discovery of peril of one on or near the track, is covered by the decisions. Louisville & N. R. Co. v. Calvert, as Adm'r, 172 Ala. 597, 55 So. 812. In Thompson & Donahoo v. Mobile & O. R. Co., 211 Ala. 646, 101 So. 441, it was declared that the engineer's duty toward the driver of a truck approaching a crossing began when he discovered the peril of the truck, which depended, not on the moment he first saw the truck, but on the relative distances

from the crossing, relative speeds of train and car, relative stopping distances, and the presence or absence of movements or apparent movements to stop the truck proceeding toward or on the crossing. The following observation was made in that case:

> " 'The duty of the engineer, now under review, began when he discovered the peril of the truck. This may or may not be the same moment he first saw the truck. The relative distances from the crossing, relative speeds, relative stopping distances, the presence or absence of movements or apparent movements to stop the truck, all enter into the inquiry whether there was apparent danger of a collision. In such conditions a collision, or no collision, often depends on the doings of only a few seconds. The measure of duty is that of careful, prudent men in view of the imminence of danger. When peril appears, the engineer must use all means known to skillful men in his position to avert an accident.' 211 Ala. 646, 647, 101 So. 411, 442.

"These are questions for the jury.

"The failure to give 'a quick, loud blast of the whistle' to warn of danger held sufficient to make a jury question in Snider v. Alabama Great Southern R. Co., 210 Ala. 119, 97 So. 209; Alabama Great Southern R. Co. v. Sanders, 203 Ala. 57, 82 So. 17; Alabama Great Southern R. Co. v. McWhorter, 156 Ala. 269, 47 So. 84.

"In Mobile Light & R. Co. v. Gadik, 211 Ala. 582, 100 So. 837, 839, it was said:

> " 'The law exacts a high degree of care of a motorman upon discovery of peril to persons or property at a public crossing—a care measured by the duty to protect life and property. He

should be watchful, alert, and capable; must promptly use all the means known to persons of skill in his position to avoid an accident. The moment of time when these new duties begin cannot well be better defined than by the natural import of the words, "upon discovery of peril." An automobile seen approaching a crossing at a safe distance and at usual speed does not within itself suggest peril. The driver may be taken to have the use of his senses, and to exercise the ordinary care which the occasion demands. But, if the automobile continues to approach without showing up, or the driver is seen to be inattentive, so that the situation suggests a probable collision unless prompt measures are taken, the duties of the motorman begin. One of the duties is usually to give a warning signal. If the automobile driver appears inattentive to the approach of the streetcar, this is an urgent duty. It should be given before it is too late to avoid a collision.'

"Touching the duty of an engineer, it was declared in Johnson v. Louisville & N. R. Co., 227 Ala. 103, 148 So. 822, that such engineer could not indulge the assumption that the motorist approaching the track at the crossing would not go on the track beyond the time when his danger become imminent; that until it became apparent to the engineer that the motorist was unaware of the train's approach and that his automobile would probably enter the zone of danger, it could not be said that the engineer discovered the motorist's peril, and if this peril was discovered in time to sound the warnings at hand and the engineer failed to do so, he was guilty of subsequent negligence; that the motorist had the burden, under a count charging subsequent negligence, of proving that negligence of the engineer proximately caused his injury."

Actual knowledge of peril as a basis for subsequent negligence and the failure of the engineer to employ the means at hand to avoid the accident may be inferred by the jury from all of the facts and circumstances attending the collision and the conditions existing after the collision. **Southern Ry. Co. v. Williams**, 243 Ala. 429, 10 So. (2d) 273.

Although the engineer testified that he did not discover intestate's peril in time to avoid the fatal collision, the jury may infer that he did. **Central of Georgia Railway Co. v. Motherwell**, 227 Ala. 300, 149 So. 820; **Central of Georgia Ry. Co. v. Ellison**, 199 Ala. 571, 75 So. 159; **L. & N. Railway Co. v. Sullivan**, 13 So. (2d) 877, 880, 244 Ala. 485.

In the case of **Southern Railway Co. v. Dear**, 26 Ala. App. 508, 512, 162 So. 685, the Court of Appeals of Alabama quoted from the case of **Louisville & Nashville R. Co. v. Calvert, Admr.**, 172 Ala. 597, 55 So. 812, 814, as follows:

> "In the Calvert Case, supra, it was said: 'There was proof that the right of way was clear, and it was not only a question for the jury, but is a matter of common knowledge, that if one looks a considerable distance ahead, though the eye is aimed at a certain point or object, that the sight will take in to some extent the surrounding or adjacent space, and it was open to the jury to determine that the engineer discovered the horse and buggy approaching the crossing and before the collision.' "

And the Court further stated in the **Dear** case, supra, that:

> "It, therefore, appears that there was evidence to be considered by the jury to enable them to determine whether or not the engineer discovered plaintiff's peril in time to have averted striking him by preventive means, and whether or not the failure of the engineer to resort to such means was the proximate cause of plaintiff's injury and damage. Under the

evidence the jury could have inferred that the engineer discovered the perilous position of the plaintiff upon defendant's railroad track in time to slacken or check the speed of the train, so as to enable the automobile to clear the track before the train reached the crossing."

In the case of **Louisville & Nashville R. Co. v. Scott**, 23 Ala. App. 132, 122 So. 184, the Court of Appeals of Alabama, affirming a judgment for the plaintiff rendered on a complaint charging negligence and wantonness, held:

"We recognize the rule so clearly stated in Young v. Woodward Iron Co., 216 Ala. 330, 113 So. 223, that 'knowledge of peril, as an essential predicate for guilt of subsequent negligence,' is necessary, and that the **knowledge** referred to means **actual** knowledge, but, where there are facts from which the jury may reasonably infer that the defendant's trainmen had such knowledge, it becomes the duty of those in charge of the operation of the train, after discovering the peril of a person on the railway track or in dangerous proximity thereto, to use all means at hand to stop or slow down the train in order to avoid the injury, and whether this was done is a question for the jury. L. & N. R. Co. v. Calvert, 172 Ala. 597, 55 So. 812; Saxon v. Cent. of G. R. Co., 192 Ala. 434, 68 So. 313; A. G. S. R. Co. v. Sanders, 203 Ala. 57, 82 So. 17."

And the Court observed in the Scott case, supra:

"Moreover, this accident would not have happened if the defendant's locomotive had been delayed a fraction of a second. So, while the engineer might not have been able to actually bring his train to a stop before reaching the point where plaintiff's car was struck, if prompt action had been taken, the speed of the train might have been so reduced that plaintiff's car would have cleared the danger. Atlantic C. L. R. Co. v. Fannin, 22 Ala. App. 374, 115 So. 850."

This Court, in the case of **Pollard v. Nicholls**, 99 Fed. (2d) 955, held:

> "The testimony of eye witnesses as to the distance the train ran without checking its speed is also competent, and may be sufficient to support a verdict, when taken in connection with the other evidence in the case, including the testimony of the engineer and fireman that the peril was discovered by them * * *."

In that case the Court of Appeals for the Fifth Circuit, construing Alabama law, affirmed a judgment for plaintiff based upon the negligence of the engineer, after discovery of peril, in failing to make use of all means at hand known to skillful trainmen to prevent injury to appellee and her companion, and this Court stated that:

> "It was a light train, consisting of an engine and four passenger coaches, and was equipped with efficient automatic air brakes. The engineer and fireman admitted knowledge of the perilous situation and testified to making due efforts to stop the train, but the failure of the engineer to check its speed before the collision, and the distance the train ran after the event, together with the other facts and circumstances in evidence, were sufficient to warrant the inference by a fair jury that the engineer did not use reasonable care to avoid the injury after discovering the peril. The difference of a few seconds might have enabled the appellee to get the horse off of the track."

In the instant case the difference of a streamlined fraction of a second might have enabled the automobile in which appellee's intestate was riding to go beyond the tracks, as the left side of the train barely touched the extreme rear of the automobile.

Applying the principles of law hereinabove set out, which are apparently well established in the law of Alabama, to all of the evidence adduced upon the trial and

the inferences fairly deducible therefrom, it is clear that there was substantial evidence to support the verdict of the jury under each count of the complaint, and that it was a jury question as to whether the engineer was guilty of negligence proximately contributing to, or wholly causing the death of appellee's intestate, in failing to check the speed of the train in time to avoid the collision and it was a jury question as to whether the engineer was guilty of negligence after the discovery of the perilous situation in failing to sound a quick, loud blast of the whistle, viz.: the emergency alarm, and ring the bell in time to warn the driver of the automobile occupied by appellee's intestate of the approach of the train so that the driver of the automobile might have taken steps to stop the automobile and avoid the fatal collision. It is also clear that it was a question for the jury to decide whether or not the conduct of the engineer, after discovering the perilous situation, was wanton in that the engineer proceeded toward the crossing, after the discovery of the peril of appellee's intestate, with a reckless indifference to the consequences. **Wilhite v. Webb** (Ala.), 46 So. (2d) 414.

The question of contributory negligence is not involved.

Notwithstanding the abundant evidence of negligence which we have cited hereinbefore, the petitioner has sought to get his petition for writ of certiorari determined in the Supreme Court almost entirely upon the question as to whether or not evidence of witnesses that they did not hear the warning signals was sufficient to make a jury question on the issue as to whether or not the engineer gave proper warning signals.

That this testimony made an issue of facts for the jury is the clear holding of the case of **Louisville & Nashville R. Co. v. York**, 128 Ala. 305, 30 So. 676 (12), and **Nashville, C. & St. L. Ry. v. Prince**, 103 So. 463, 212 Ala. 499, and the ruling of the Court of Appeals in this regard is in

entire accord with the applicable decisions of the Supreme Court of Alabama. See other authorities cited in this brief under Point of Law VIII.

The case of **Nashville, C. & St. L. Ry. v. Prince**, supra, is a case where plaintiff was suing for injuries in collision between an automobile and railroad train at a crossing, where no contributory negligence was involved, where defendant railroad company offered the same argument with reference to the negative character of the evidence for plaintiff—many witnesses did not hear or take notice of any signals—and the Supreme Court said that while this furnished good ground for argument before the jury in considering the probative force of testimony, it did make a jury issue and they affirmed the judgment of the court below in favor of the plaintiff, saying that the negative testimony with regard to witnesses not hearing the signals made a case for the jury.

In the case of **Louisville & Nashville R. R. v. York**, 30 So. 676, 128 Ala. 305, the court below refused to give charge numbered 6 to the defendant, and the Supreme Court of Alabama with respect to that action of the trial court stated:

> "We do not think it can be affirmed, as postulated in charge 6 refused to the defendant, that the fact that one in a position to hear a bell does not it is no evidence that the bell was not rung, even though he admits he was 'paying no attention, and that the bell might have rung, and he might not have heard it ring.'" **Louisville & Nashville R. R. v. York**, supra.

There was substantial evidence from which the jury might infer that the engineer saw the automobile approaching the crossing in a manner indicating that the driver was unconscious of his surroundings at a point when the train was at a sufficient distance from the crossing for the

engineer to have taken effective steps to slacken the speed of the train and prevent the collision and was negligent in this regard, or that in the exercise of due care he should have seen it, or that the engineer was indifferent to the consequences after discovering the perilous situation. It will be recalled that Herbert Foster testified that the automobile was traveling fifteen to twenty miles an hour as it approached the crossing. The engineer admitted he saw the automobile seventy-five to one hundred feet from the crossing before the collision and Foster testified that when the train was two hundred feet from the crossing the automobile was fifty feet from the crossing. This evidence, taken in connection with the other evidence hereinabove set forth in this brief, warranted the submission of all counts to the jury.

The Court of Appeals has affirmed the trial court's ruling. In this we submit the Court of Appeals was correct.

Applying the general rule that the Supreme Court of the United States will be very loath to disturb findings of fact where they have been made by two separate and distinct courts after full consideration thereof, we respectfully submit that the Supreme Court of the United States should refuse to exercise its discretion in favor of petitioner and should deny the writ of certiorari.

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Certificate of Service.

I, the undersigned attorney of record for the respondent in the above styled cause, do hereby certify that I have on this, the ..... day of April, 1952, served a copy of the above and foregoing Brief and Argument upon the Honorable Peyton D. Bibb, attorney for petitioner, by mailing a copy thereof, with proper postage affixed, addressed to him at 1115 First National Building, Birmingham, Alabama.

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G. Ernest Jones, Jr.